Report of the

Vermont Commission on Family Recognition and Protection

April 21, 2008

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Introduction

The Vermont Commission on Family Recognition and Protection (the "Commission") was established July 24, 2007, by joint action of the Speaker of the Vermont House of Representatives, Gaye Symington, and the President Pro Tempore of the Vermont Senate, Peter Shumlin, for the purpose of reviewing and evaluating Vermont's laws relating to the recognition and protection of same-sex couples and the families they form. The Commission was charged with addressing, at a minimum, three particular issues:

1. The basis for Vermont's separate legal structures for recognizing and protecting same-sex couples versus heterosexual couples.

2. The social and historical significance of the legal status of being "married" versus "joined in civil union."

3. The legal and practical challenges faced by same-sex couples joined in civil union as compared to heterosexual married couples."

The Commission was asked to invite the input of a range of Vermonters on these questions, including scholars and experts, and the general public, as well, through a series of at least six public hearings. The Commission was directed to report its findings and recommendations to the Vermont House and Senate Committees on Judiciary by the end of April 2008. A copy of the Commission's charge is at Appendix A.

The Commission consisted of 11 members:

Tom Little of Shelburne (chair), attorney and former member of the Vermont House of Representatives
John Bloomer, Jr. of Rutland, attorney and former member of the Vermont Senate
Sen. John Campbell of Windsor County, attorney
Mary Ann Carlson of Arlington, counselor and former member of the Vermont Senate
Berton R. Frye of West Danville, quarry owner
Governor Phil Hoff of Burlington, former governor of Vermont
Rep. Johanna Leddy Donovan of Burlington
Barbara Murphy of Johnson, President of Johnson State College
Helen Riehle of South Burlington, Executive Director of Vermont Program for Quality in Health Care, former member of the Vermont Senate and Vermont House of Representatives
Michael Vinton of East Charleston, polygrapher, retired state trooper, and former member the Vermont House of Representatives
The Rev. Nancy Vogele of White River Junction, Episcopal priest

The Commission held an organizational meeting on August 23, 2007, at the Vermont State House to discuss its charge, the format for its public hearings, and its work plan. At this meeting, the Commission discussed the scope and meaning of its charge and the charge's implications for the Commission's process, hearings, and the content of its report. The members also discussed what kind of hearings should be held, and whether the Commission should hold facilitated small group discussions as part of its work. The members reached a consensus that conventional "listening" sessions should form the basis of the hearing process, and that the hearings should be held in all corners of the state.

In September, the Commission announced a schedule of eight public hearings around the state:

October 10, 2007: Johnson, at Bentley Auditorium, Johnson State College
November 19, 2007: Lyndonville, at Lyndon State College
December 5, 2007: Brattleboro, at Brattleboro Middle School
December 10, 2007: St. Albans, at Bellows Free Academy
December 18, 2007: Montpelier, at the State House
January 12, 2008: Bennington, at Mount Anthony Union Middle School
February 2, 2008: Rutland, at the Godnick Adult Center
February 11, 2008: Williston, at Williston Central School Auditorium

The Commission also held a legal issues symposium at Vermont Law School in South Royalton on October 29, 2007. The Commission invited legal scholars to present testimony on the issues posed to the Commission in its charge. Presenters included:

Professor Peter Teachout, Vermont Law School
Professor Gregory Johnson, Vermont Law School
Mr. Monte Neil Stewart, President, Marriage Law Foundation
Professor Michael Mello, Vermont Law School

The Commission established a webpage on the General Assembly's website in order to post information about the Commission and its work.[1] Notice of the meetings and hearings was sent to all Vermont media outlets on two occasions prior to each event. Vermont Public Television aired the first organizational meeting of the Commission and broadcast the Lyndonville public hearing as part of its Public Square program, which was accompanied by an online stream and live web chat. News articles, editorials, and op-eds concerning the work of the Commission appeared in news outlets throughout the state, including: The Bennington Banner, The Brattleboro Reformer, The Burlington Free Press, The Castleton Spartan, The Barre-Montpelier Times-Argus,

The Rutland Herald, The St. Albans Messenger, Vermont Public Radio, WCAX TV, WPTZ TV, and a number of local cable television public access channels.

The Commission received over 100 written comments submitted through mail or e-mail in addition to the testimony received at the public hearings. These submissions and all documents submitted for the Commission's consideration are part of the Commission's record and are available for viewing at the Office of Legislative Council in Montpelier.[2]

The Public Hearings

The Commission held eight public hearings. Attendance ranged from 80 (St. Albans) to 200 (Rutland), and roughly 30 persons testified at each hearing. As discussed below in this report, supporters of same-sex marriage outnumbered opponents by roughly 20 to one. The Commission began each meeting by handing out a memo describing the content of the hearings and the hearing format and courtesies. (Appendix B)

Each hearing was divided into two parts. The first part was an hour-long informative session on the history of recognition of the legal rights of gays and lesbians in Vermont. After the presentations, the public was invited to ask questions or discuss any of the issues raised.

Chair Little addressed the issues of adoption and anti-discrimination legislation in the 1990s. Based on the state's tradition of equality under the law and of strong families, for over 30 years, Vermont probate courts have qualified gay and lesbian individuals as adoptive parents. In addition, Vermont was one of the first states to adopt comprehensive legislation prohibiting discrimination on the basis of sexual orientation.[3] As the basis for our current discussion of marriage, Little reviewed the Vermont Supreme Court's 1999 decision in *Baker v. State*[4] which required the state to provide same-sex couples with the same legal benefits and protections afforded to married opposite-sex couples. In the opinion, Chief Justice Amestoy wrote:

> *The extension of the Common Benefits Clause[5] to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity.*[6]

The Court deferred to the General Assembly to fashion a remedy to the constitutional violation found in *Baker* and Little, chair of the House Committee on Judiciary in 2000, explained the legislative process and response to *Baker*. After months of debate, the civil union act was signed into law by Governor Howard Dean on April 26, 2000.[7]

Legislative counsel Michele Childs reviewed the work of the Civil Union Review Commission which was created by the General Assembly to facilitate implementation of the civil union law and monitor and evaluate the impact of the new law.[8] In its final report, the Commission concluded:

> *The Commission's examination of the first eighteen months following the effective date of the civil union law reveals that the law is working as intended in Act 91. Act 91 satisfies the constitutional mandate of the Baker decision by providing to eligible same-sex couples who choose to join in civil union the benefits, protections and responsibilities that married couples have under Vermont law. In addition, Act 91 has brought no material adverse impacts on state government, on Vermonters, on the Vermont economy or the state generally.*[9]

Childs also provided a summary of the legal status and recognition of same-sex relationships in other states. Ten states and one district currently permit establishment of legally recognized same-sex relationships:

- Massachusetts is the only state that permits same-sex couples to marry.
- Vermont, Connecticut, New Jersey, and New Hampshire allow civil unions which provide all the benefits of marriage.
- California and Oregon have domestic partnerships that provide most all of the benefits of marriage.
- Hawaii has reciprocal beneficiary relationships, and Maine, Washington, and Washington, D.C. have domestic partnerships that provide some marital benefits.[10]

In contrast, Childs said that 41 states have state statutes defining marriage as the union of one man and one woman, and 27 states have added that definition of marriage to their state constitutions.[11] Only six states have no prohibition against same-sex marriage.[12] In addition to these laws, there are court decisions and attorney generals' opinions in various states that address whether an individual state will recognize a same-sex relationship celebrated in another state,[13] as well as the federal Defense of Marriage Act (DOMA) which was enacted in 1996 by Congress and signed into law by President Bill Clinton. It consists of two parts: 1) States that no state need recognize a marriage between persons of the same sex, even if the marriage was legally established or recognized in another state; and 2) Defines marriage for federal purposes to include only the union of one man and one woman.[14] According to Childs, this has created a complicated legal patchwork for determining the current and future rights of Vermont same-sex couples outside the borders of Vermont.

The second part of the hearings was devoted to taking testimony from members of the public. Anyone in attendance who wished to speak was given the opportunity, and testimony at each hearing averaged approximately two hours. The Commission suggested a time limit of three minutes per person and heard from over 240 people. Of those who testified, supporters of same-sex marriage outnumbered opponents by approximately 20 to one. With rare exceptions, the witness testimony and audience behavior were civil and respectful. Both sides commented that the hearings were a good opportunity to express their views on the issues.

The testimony of Vermonters at the Commission's hearings was broad in scope and presented many deeply personal descriptions of living with our state's civil union law. Some themes emerged from the public comments received through both personal testimony before the Commission and letters sent to the Commission. We have tried to summarize these comments for this report while acknowledging that it is impossible to cover all the concerns raised with the detail and nuances with which they were presented. Audio copies of the hearings and copies of correspondence are available at the Office of Legislative Council.

Testimony and Letters in Support of
Allowing Gay and Lesbian Couples to Marry

As mentioned above, the testimony and correspondence received by the Commission was overwhelmingly in favor of inclusion of gay and lesbian couples within the marriage laws. The following were the principally recurring themes from the testimony and letters.

Civil unions are separate, but unequal.

The single, most common theme in the testimony around the state was that true equality cannot be achieved when there are two separate legal structures for conferring state benefits to couples based upon sexual orientation. According to many witnesses, denying same-sex couples access to the widely recognized institution of marriage while conferring the legal benefits under a parallel system with different terminology sends the message that same-sex couples are different from or inferior to opposite-sex couples and unworthy of inclusion in the marriage laws.

One woman who grew up on a dairy farm in Franklin as the youngest of 12 children, three of whom are gay or lesbian, wrote of how within her family all the siblings are treated the same, yet the community treats them differently.

> *All of my siblings are either married or engaged to be married with the exception of the three siblings who do not have marriage as the option. This does not seem fair in this great country of opportunity and prosperity. The question of "why" enters my mind frequently. Why is it that nine of my siblings can share in all that marriage has to offer and yet, we (the gay/lesbian portion of the family) cannot? What is it about my [heterosexual] siblings that the three of us do not possess? We are all of similar make-up, educational backgrounds, family values, success in careers, and love for our children. The answer can only be that we (my two brothers and I) are not as valued by our fellow citizens as my heterosexual siblings. How can this be?. . .This is an astonishing realization.*[15]

Testimony urged that a separate system of recognition for same-sex couples violates fairness values deeply and widely held in Vermont and also violates the Vermont Constitution's Common Benefits Clause. While the civil union law requires that "[p]arties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage,"[16] in an attempt to create a separate but equal status, many who testified stressed that the very existence of a separate track for same-sex couples is unfair and creates an inferior status for same-sex couples and their families.

> *In my experience with children [as a licensed psychologist-master], the fact that their parents cannot marry and have to have an alternative to marriage sends a*

very bad message. It is no different than water fountains for "negroes" and "whites" 45 years ago. The message is, "your family isn't good enough and therefore your parents are unable to marry." No child should feel inferior because of the gender combination of their parents.[17]

Witnesses often drew analogies between the civil union law and the U.S. Supreme Court's 1896 decision, *Plessy v. Ferguson*,[18] in which the Court upheld the constitutionality of a state law imposing racial segregation in public accommodations (specifically, railroad passenger cars), provided the accommodations were equal. Frequently during this testimony, the Commission heard comments about second class citizenship, stigmatization, and "separate cannot be equal." Bishop Thomas C. Ely of the Episcopal Diocese of Vermont urged civil marriage equality for all Vermonters as a matter of civil rights.

In the reality of our having lived with civil unions in Vermont for seven years now, we know that, as was true with school segregation, so too with civil unions and civil marriage: separate is not equal. Discrimination does continue, and while making provision for marriage equality for all couples here in Vermont will not end the discrimination against gay and lesbian couples in other states and in the federal laws, it will be an important step in the right direction. [19]

Bishop Ely continued, explaining a position asserted by many of the clergy who testified before the Commission.

The other point I want to emphasize tonight is that providing the civil right of civil marriage to heterosexual and homosexual couples alike would not compel any religious community to perform marriages of same-sex couples. The state allows ordained clergy and certain other designated religious persons to act as agents of the state with regard to civil marriage, but no clergyperson is required by the state to do so. Different religious communities have different theological views on the subject of matrimony. The privilege and religious freedom to express and act upon those convictions is not compromised by the state providing civil marriage and the subsequent civil rights of marriage to all couples. It is my conviction that the church can and should support civil marriage for all - even if, at this time we are not of one mind about the church's involvement in these ceremonies.[20]

<u>Civil union status is not "portable" to other states.</u>

Many witnesses with civil union licenses described the challenges, frustrations, and fears that the laws of most other states do not recognize their civil union status as the equivalent to marriage. The nonrecognition by other states (and countries) of the new and relatively uncommon legal status of civil union was often referred to by witnesses

as the lack of portability of civil unions. Civil union couples testified that when traveling outside Vermont, they take powers of attorney and other legal documents to prove their legal status but still have encountered confusion, disagreement, and nonrecognition in a variety of situations, some presenting significant risks. For example, there was testimony that government agencies, courts, and hospitals in other states fail, neglect, or refuse to understand or recognize civil union status. A witness at the Bennington hearing testified that a national employer with a Vermont operation denied employment benefits to an employee in a civil union while conceding that if the employee were married, the benefits would be provided.

A woman from Springfield told the Commission that she and her civil union partner went to great lengths to ensure that when her partner experienced problems during her pregnancy and delivery, she was treated in Vermont hospitals even though similar specialists were available in much closer proximity in a neighboring state. After the birth of the child, even though Vermont law provides that a child born during a civil union is presumed to be the child of both the civil union partners,[21] the woman who was not the biological mother of the child legally adopted her son to ensure that she would be recognized as his mother when traveling outside Vermont.

> *No family should have to worry about which state to be in when a baby is born. No parent should have to worry that his or her infant could be considered parentless in a foreign state because that state does not recognize the civil union. Navigating medical emergencies is stressful enough for families without having to worry about these kinds of issues! Civil unions have gone a long way toward providing rights and benefits, but it has not made it possible to travel the country freely without being terrified that someone might not let you near in an emergency or might even refuse to recognize you as a parent.*[22]

While there is no guarantee that another state would recognize a Vermont same-sex marriage under similar circumstances, from the consistent testimony received at the hearings, it is clear that many gay and lesbian couples would feel less vulnerable when trying to assert their legal rights outside this state if they could say they are married rather than in a civil union.

<u>Civil unions are less likely than marriage to be recognized by the federal government.</u>

Federal law specifically denies recognition of same-sex marriages or unions that are treated like a marriage. Many witnesses shared experiences about how their civil union partners would not be entitled to Social Security or veteran's survivorship benefits because they were not recognized as spouses under federal law. Others shared complicated stories of immigration issues that would not have been a problem if the civil union partner were recognized as the married spouse. While it is unlikely at this time that the federal government will recognize a same-sex marriage any more than a civil union, many couples believe that they would be on firmer ground to assert such

rights and that gaining marital status in Vermont would allow them to establish standing to challenge federal law in court.

The differences in language between civil union and marriage are powerful.

A significant number of witnesses testified that the differences in language between marriage and civil union status perpetuate treating gays and lesbians and their families as different, as "other," with stigmatizing results.[23]

A man from Randolph wrote about how his father refused to attend his civil union ceremony while he happily attended the marriage of the man's gay brother in Massachusetts a short time later.

> *My father emphatically would not attend a civil union ceremony. In his mind, a civil union was something for and about gay people. Not gay himself, he felt apart from it, and was unable to conceptualize a role for himself in this gay ceremony. . . [In attending my brother's wedding, my] father understood what marriage means, and he understood his social role in welcoming a new son into his family through marriage. A marriage meant something to my father that a civil union could in no way replicate. . .I urge you to consider the deep social significance that marriage has, and to acknowledge in your report to the State Legislature the inability of civil unions to replicate that.* [24]

Witnesses stressed that words and how words are used in our language are very important, symbolic, and powerful. Marriage is the "gold standard" for many couples and a term which everyone understands. A justice of the peace in Coventry said he has certified several civil unions and his participation in those ceremonies led him to believe that gay and lesbian couples should be afforded the right to marry:

> *The civil union ceremony itself is discriminatory for several reasons. It does not allow the use of the words marry, marriage, wed, wedding, husband, and wife. All these words have deep personal value to all who are united in a committed relationship. The pronouncement at the conclusion of a civil union is weak in comparison to that of a marriage ceremony. It is clear to me as a justice of the peace who was instructed by the secretary of state that we must not discriminate against gays and lesbians, that I was doing exactly that by being restricted to a ceremony that was void of valued word.* [25]

Many witnesses who have civil union licenses described situations, in Vermont and elsewhere, when seeking the benefit of the civil union law, in which they were forced to explain their civil union status, what a civil union is, and how a civil union by law secures a legal status and consequences equal to marriage. The consequences of these conversations include: (i) "outing" oneself as gay or lesbian in situations where this is unnecessary, irrelevant, or a breach of privacy; (ii) the frustration of the additional time it often takes to explain successfully what a civil union is; and (iii) the difficulties

encountered when using government, business, employer, and health care forms and documents that do not contemplate or appropriately deal with the status of being in a civil union.

A woman who worked for a business in central Vermont told the Commission that her employer, a self-insured company, denied health benefits to her civil union partner while providing such benefits to all the other employees with spouses. When the woman inquired about the disparate treatment, she said the CEO compared civil union couples to employees who live with their boyfriend or girlfriend, but did not equate them with married couples.

> *We believed that part of the CEO's failure to take civil unions seriously was his unfamiliarity with them and that the term "civil union" was nebulous enough to allow him to automatically dismiss our relationship. Had full marriage rights been accorded to lesbian and gay couples in Vermont, it is still possible that we would have been excluded from coverage, but we still believe that it would have been much harder for the CEO. . . to dismiss our relationship as insubstantial and casual.* [26]

Civil union couples experience more governmental and health care paperwork and hurdles.

Many witnesses testified that civil union couples face more complicated income tax filing requirements than do married couples, resulting in higher tax preparation fees for them and often higher taxes. For example, for purposes of Vermont income tax, civil union partners are treated as if married and must file their Vermont income tax return as either "Civil Union Filing Jointly" or "Civil Union Filing Separately." However, because federal tax law does not recognize civil unions, this is a filing status for Vermont only. To complete the Vermont return, civil union partners are instructed to prepare a federal return, apply the federal rules as if they were married, and complete the standard Vermont return using income based upon the specially prepared federal return, rather than the one actually filed with the IRS. Civil union couples must attach both the "dummy" federal return and the real federal return to the Vermont tax return.

Witnesses also mentioned how, due to lack of recognition of civil union partners as spouses by federal tax law, an employer's health care contribution to coverage of an employee's civil union partner or the partner's dependents must be considered imputed income for federal tax purposes. While Vermont does not consider the employer's contribution to be income, and the employee is not taxed at the state level for the employer's contribution, these types of inconsistencies between state and federal law create additional costly burdens that married couples do not have to endure.

Children thrive in civil union families.

Witnesses at every hearing testified about the ability of gay and lesbian couples to raise healthy, happy children in a stable, safe, and loving family environment. These

witnesses included couples, their friends and families, their children, school teachers, and clergy. These witnesses' experience, dating back prior to the enactment of the civil union law, is that children who are raised in same-sex couple families are as well adjusted as children of heterosexual couples. A school administrator wrote:

> *[In my professional role] I have seen the loving home and rich opportunities that have been available to students regardless of whether they have two moms, two dads, or a mom and a dad. I have observed that commitment and a loving home are not gender based – but correlate highly with stability. Granting same-sex couples the right to marry would enhance a healthy sense of belonging and stability for all children in our schools.* [27]

Many witnesses spoke of the evolving nature of the family structure. Many children are raised today by single parents or in "blended" families with one biological parent and a stepparent and step- or half-siblings. Extended families are making a comeback with older generations living closer to children and grandchildren and participating in one another's daily lives. These witnesses asserted that failure to recognize the changing family dynamics by favoring a traditional-looking "Leave it to Beaver" family while not supporting a less traditional family when both are looking for a stable environment in which to raise children does a disservice not only to families but to communities as well.

> *The legal concept of family is only broadened, made more flexible, when we open our hearts and minds by thinking outside of the traditional box. From what I can see, traditional views of marriage do not offer a guarantee of stability to the family. We all know too many dissolved marriages, broken homes, and fractured families. . . We need to give equal rights to these "non-traditional" couples. Having stable, non-traditional families in our neighborhoods can only increase the value of our more traditional one and strength our communities.* [28]

Witnesses uniformly testified that while civil union status has improved the legal structure supporting these families, there are significant shortcomings compared to the legal status of marriage.

<u>The "sky didn't fall" when civil unions were enacted; there is no harm extending marriage to all couples.</u>

This testimony asserted that the dire consequences predicted by many for Vermont upon enactment of the civil union law did not come to pass. They observed that tourism did not disappear, state government was not overburdened, Vermont did not become a "gay mecca," and "traditional" families were not harmed. Similarly, these witnesses testified about their experience in that there is no basis to support the fear that there would be

any real harm from granting full marriage access. Frequently mentioned by both heterosexual and homosexual witnesses was the belief that same-sex marriage presents no threat to heterosexual marriage.

> *My wife, Donna, and I have been together for 25 years. . . The idea that same-sex marriage would hurt opposite-sex marriage makes no sense to me. As human beings, we live in a community and rely on one another. During [a health care] crisis, friends took care of our house, colleagues filled in at business, and the hospital honored our relationship. If our friends who are same-sex partners are denied the same right to marry which we enjoy, then their strength, well-being and stability are undermined, which compromises the entire fabric of the community we rely on.* [29]

Civil marriage should be a secular legal right for everyone.

Many supporters of extending the right to marry to same-sex couples emphasized that the debate before us now is about civil marriage, not religious marriage.

> *As a member of the clergy, I experience and "witness" this issue from a religious perspective, but I am able to distinguish between my religious preferences and what should be the rights of all Vermont citizens. Religious recognition (or non-recognition, for that matter) of same-sex unions is a separate issue. I do believe that my experience as a minister gives me a unique and valuable vantage point on this issue, but speaking as a plain citizen of Vermont, shedding my clerical robes, I would argue simply that civil marriage is an issue of civil rights.* [30]

These witnesses felt strongly and testified with passion that individuals' personal religious beliefs about homosexuality and marriage should not play a part in determining who should have the protection of state-granted legal rights. Witnesses were respectful of the fact that people of different faiths may have very divergent beliefs on this topic, and that it was valid for members of a particular faith to determine whether they would acknowledge or sanction same-sex unions or marriage within their faith. However, according to these witnesses, religious beliefs should not dictate whether secular state laws are applied equally to all families, gay or straight. A member of the clergy from Enosburg testified:

> *It goes without saying that the laws of the state should not be dictated by the principles of any one religion. State laws are for the good order of the state and the benefit of its citizens, and must not favor one group over another. So I think it is not valid to argue that marriage should be only between a man and woman because the Bible or other religious tradition says it must be so.* [31]

Our marriage laws are an anomaly. We proclaim separation of church and state, yet in this one instance we make ministers of religion, by the very fact of their ordination, officers of the state. As my colleague John Morris has pointed out in his history of marriage, I baptize children, but I do not sign their birth certificates. I preside at funerals, but I do not sign death certificates. But when I officiate at a wedding, I am obligated to sign the marriage certificate in order for the couple to be legally married – unless they have had a prior ceremony. As an officer of the state, I am constrained by the laws of the state in performing an action that is simultaneously a matter of state law and of religious practice. [32]

Witnesses, especially clergy, frequently commented that the combination of the civil and the religious within the marriage laws is a significant obstacle to equal protection under the law. They stated their belief that separation of church and state is imperative to a well-functioning government and community.

Why do we not separate the legal contract of marriage from the religious blessing of the couple? The sanctity of marriage is on tension with the legality of marriage. Since 50% of all marriages end in divorce, I would argue the reality of that "sanctity." Although I continue to support religious marriages, including those of the GLBT community, I desire a more realistic understanding of the contract and a more grounded understanding of the covenant. [33]

<u>Vermont is ready to take the next step.</u>

Some witnesses observed that what Vermont has learned since enactment of civil unions is not what problems it created, but rather that a civil union license is not as good as and is not equal to a marriage license. Many said that the civil union law was a step in advancing the civil rights of gay and lesbian Vermonters, but not a sufficient step and certainly, for them, not the last step. For these witnesses, and there were many of them, Vermont is now "ready" to move to full access to marriage for lesbian and gay couples.

We say that parties to a civil union have all the same sights as parties to a marriage – but there is one right that is missing – the right to call that legal contract a marriage. The civil union law was a good step at a time when many Vermonters were not ready for a bigger change. We tried it out, it has worked fine and now I say that it is time for us to take off the training wheels. . . We already have a perfectly good word to describe the pact between two people who pledge to live their lives together. The word is marriage. Let's use it. We don't need civil unions anymore. [34]

We live in changing times and must move forward, state by state, in giving all family members the rights they deserve. Let Vermont be the next state to move forward and set an example for others to follow. [35]

Similar testimony came from the youngest witnesses, those in high school and college, many of whom asked the Commission and the General Assembly to focus on the loving nature of a relationship and not the sexual orientation involved.

The Commission believes this testimony reflects the evolution of attitudes in Vermont since the enactment of Act 91 toward greater and more open acceptance of gays and lesbians in Vermont society, community, and public life.

Testimony and Letters in Opposition to
Allowing Gay and Lesbian Couples to Marry

While the testimony and correspondence received by the Commission in opposition to inclusion of gay and lesbian couples within the marriage laws was in the minority, people who did express their thoughts did so with conviction. The following were themes from these submissions.

Civil unions granted legal benefits to same-sex couples, and Vermont should not invite another divisive debate on this issue.

This testimony urged that the civil union law has done everything compelled by the *Baker v. State* court decision, arguing that any deficiencies are caused by federal laws, which are beyond the control of Vermont law. The testimony clearly suggested that a legislative effort to establish gay marriage in Vermont would be an unwelcome and deeply divisive experience for Vermonters who oppose it.

> *Gay marriage would. . . continue to drive a wedge between left and right – making something that should no longer be an issue another point of contention. . . [I]f we are ever to enjoy a state of compromise in this country, I think this issue is one that calls for it. It is time to leave well enough alone.*[36]

Same-sex marriage fundamentally misunderstands the institution and role of marriage.

This testimony presented the institution of marriage as having a meaning and role in society prior to, above, and beyond the legalities of marriage. One witness stated that "marriage is absolute," meaning that the General Assembly cannot, and should not, alter or attempt to alter the fundamental meaning and structure of marriage as a heterosexual, one man–one woman relationship. Several witnesses observed that the institution of marriage has served the common good of the people of the state well, is proven to be safe and nurturing for children, and should not be tinkered with on account of asserted individual rights. Several of these witnesses characterized or defined homosexuality, or homosexual behavior, as a lifestyle choice that should not be endorsed by the state.

> *I am vehemently opposed to homosexual marriage on the basis that marriage is ordained by God between one man and one woman. Marriage has been defined as between one man and one woman throughout history and it has served our civilization perfectly and will continue to do so. To allow the same sex to marry would be only to make the real meaning of marriage change to suit a small minority's desires. . . I believe this is not a civil rights issue, but a lifestyle choice that is trying to be made acceptable to the mainstream population.*[37]

Traditional marriage derives from biblical truths and values and should be protected.

A majority of the witnesses opposed to same-sex marriage included comments or arguments relying on their understanding of the meaning and authority of Christian scripture, in both Old and New Testaments of the Bible. These witnesses urged the state to not stray from the Christian truths and values that, in their judgment, have guided this country for so long.

> *I realize that a union between two consenting males or two consenting females does not at first view seem abusive or harmful as some other forms of sexual behavior which are legally prosecuted, but for our government to officially and legally open the door to accept and promote a behavior that goes against God's warnings is clearly to invite distress in days to come.* [38]

> *We are Biblically opposed to homosexual marriage and civil unions, not because we hate homosexuals but because we do hate the sin they are in, because God does. What they are doing is in complete opposition to God's moral laws as stated in the Bible in many places. It also erodes the country, as families fall apart and there is more crime and heartbreak, kids committing suicide[,] using drugs[,] having sex and babies out of wedlock – all because we are not following God's moral laws.* [39]

Legal Issues Symposium

In order to address the legal issues implicit within the Commission's charge, the Commission contacted Vermont Law School to request the assistance of Vermont legal scholars. The law school offered Professor Greg Johnson and Professor Michael Mello, both of whom have written extensively on the issue of civil unions, and Professor Peter Teachout, a scholar of the Vermont Constitution. The Commission also invited Mr. Monte N. Stewart, Esq., former law professor and current president of the Marriage Law Foundation, who has published numerous articles on marriage.

The Commission provided the presenters with five questions, derived from the three components of the Commission's charge and asked that the attorneys focus their testimony on these questions:

1. What are the legal consequences between marriage and civil union in Vermont? In terms of legal benefits, protections, rights, and obligations, what does a marriage license deliver you that a civil union license does not? Do these differences raise any statutory, common law, or constitutional law issues?

2. Which states, if any, officially recognize a Vermont civil union? Is the recognition statutory or judicial? Is the recognition full or partial or circumstance-driven? Same questions about the federal government. Are there any differences compared to recognition of a same-sex marriage from Massachusetts or Canada?

3. In terms of tangible legal consequences, including recognition by other states or the federal government, what identifiable advantages or disadvantages would a lesbian couple with a Vermont marriage license have that it does not have with a Vermont civil union license?

3. What decided cases and/or pending litigation (including challenges to state or federal Defense of Marriage Act laws) are there which bear on these questions? What do the reported DOMA cases tend to say?

4. Why did the Massachusetts court reach a different conclusion from the Vermont court? Was there any significance for these reasons for the Vermont civil union law?

5. As posed by the charge to the Commission, what is "the basis for Vermont's separate legal structures for recognizing and protecting same-sex couples versus heterosexual couples?"

The Commission spent an afternoon at Vermont Law School hearing from the four legal scholars. The afternoon provided the Commission with valuable information and an interesting range of views and opinions. The Commission members had the opportunity to ask questions of each scholar, and this clarified certain points and enabled the speakers to delve into some areas in greater detail.

The following are short synopses of the presentations at Vermont Law School. Copies of written submissions of the presenters are available at the office of legislative council.

Professor Greg Johnson

Professor Johnson began his testimony by informing the Commission that he is a gay rights advocate and supports permitting same-sex couples to marry. However, he said that he saw his role that day as informative rather than persuasive and hoped to be of assistance in helping the Commission understand the changes across the country since the civil union law was enacted in 2000.

In response to the first question about the legal consequences between marriage and civil union, Professor Johnson testified that extending marriage to same-sex couples in Vermont would not deliver any new legal rights and benefits to those couples. The civil union act specifically grants same-sex couples "all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage."[40] He noted that there are some 1,096 federal rights and benefits of marriage that civil union couples cannot enjoy because of the federal Defense of Marriage Act (DOMA),[41] which defines marriage for purposes of federal law as only the union between one man and one woman. Professor Johnson explained that the few judicial and administrative decisions regarding DOMA have held that the act prohibits same-sex couples from accessing federal benefits whether they are in a civil union or a marriage, and, thus, he did not believe that granting Vermont same-sex couples the right to marry would provide them with the federal legal benefits of marriage.

Professor Johnson testified that the question that is currently being debated in the courts is whether the establishment of a separate system to deliver marital rights to gay and lesbian couples is inherently unequal and therefore violative of constitutional guarantees of equal protection under the laws. The Court in *Baker* did not require the state to issue marriage licenses to same-sex couples and deferred to the General Assembly to determine how the benefits could be granted to same-sex couples. The Court left open the possibility that a later case may establish that anything but a marriage license falls short and is, therefore, unconstitutional. Johnson explored whether a gay or lesbian couple's lack of access to the word "marriage" is, under the *Baker* decision's analysis by Chief Justice Amestoy, a violation of the Vermont's Commission's Common Benefits Clause and suggested that this is a close call.

Johnson said that the Massachusetts Supreme Judicial Court considered this exact issue and when asked by the Massachusetts Senate whether civil unions were permitted under the decision in *Goodridge v. Dept. of Health.*[42] "In a 4-3 vote, that court, citing *Brown v. Board of Education*, said flatly that separate is never equal.[43] The court used language drawn from the civil rights movement of the 1960's:

> *The dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is considered a choice of language that reflects a demonstrable*

> *assigning of same-sex, largely homosexual, couples to a second-class status…The [civil union] bill would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits…The history of our nation has demonstrated that separate is seldom, if ever, equal."*[44]

However, according to Johnson, in *Kerrigan v. Connecticut* a Connecticut Superior Court addressed the same question and came to a different conclusion, stating that it had "been unable to find any case in which the mere difference in nomenclature applied to two groups" who otherwise received the same legal benefits raised equal protection issues. Thus, the Connecticut Superior Court found no constitutionally significant differences between civil unions and marriage.[45]

With respect to recognition of Vermont civil unions in other jurisdictions, Johnson said there are eight states that have recognized the legal rights of such unions: New Hampshire and California through statute; Connecticut, New Jersey, and New York through a state attorney general's opinion; and Massachusetts, Iowa and West Virginia through a judicial decision. Massachusetts same-sex marriages are legally recognized in four states: as civil unions in New Hampshire by statute and in New Jersey by attorney general opinion, and as marriages in Rhode Island and New York by attorney general opinion. According to the Vermont Attorney General's Office, Vermont would most likely recognize a Massachusetts marriage as a civil union.[46]

In response to the question of whether a civil union might have a better chance than a same-sex marriage of being recognized in another state, Professor Johnson said that while there are arguments for both sides, "the bottom line is that whatever the same-sex relationship is called, the chance of it being recognized in other states is slim." The general rule of marriage recognition is called the "place of celebration" rule which is the idea that a marriage is valid everywhere if it is valid where it was celebrated. However, a state does not have to recognize the marriage if it violates the strong public policy of that state.[47] Additionally, the federal DOMA specifically states that no state is required to recognize a same-sex relationship treated as a marriage in the state in which it was celebrated.[48]

Johnson told the Commission that as of today, 26 states have amended their constitutions to limit marriage to one man and one woman and 19 states have enacted statutes to that effect, while 17 states have amended their constitutions to prohibit the recognition of any same-sex relationship, including civil unions. These state prohibitions are commonly referred to as "state DOMAs" or "mini-DOMAs." According to Johnson, litigation to overturn state DOMAs faces substantial challenges based on current court precedents, except where a state DOMA prohibits recognition of any same-sex relationship and lacks any rational basis for the discrimination.

In addressing the reasons for the separate legal structure for recognizing and protecting same-sex couples versus heterosexual couples, Johnson told the Commission that the concerns in 1999 expressed by both the Court in *Baker* and the General Assembly with respect to making a sudden change in the marriage laws were legitimate at the time,

considering that no state had come close to recognizing same-sex marriage or the equivalent of civil unions. Johnson praised the Court and the legislature for taking the incremental approach as the best way to address a divisive issue. "Yet," said Johnson, "times have changed dramatically in just seven short years. What was once radical is now blasé."

Professor Johnson concluded his presentation by suggesting that the civil union law may be a good transition law for Vermont, but if Vermont enacts same-sex marriage, in his judgment the civil union law should remain as an option for those who want its legal protections and status but who cannot embrace the institution of marriage for a variety of historical and other reasons. "I ascribe to a model which would give couples a wide range of choices…The fullest flowering of freedom in relationship and family choices would come when we break away from the limited binary view of marriage or nothing." *(Professor Johnson's written testimony can be found at Appendix C.)*

Professor Peter Teachout

Professor Teachout opened his remarks with a discussion of his view that the General Assembly has the right and responsibility, independent of the Vermont Supreme Court, to make judgments on what the Vermont Constitution means and requires.

He observed that the *Baker* decision did not decide that marriage, per se, for gay and lesbian couples, is compelled by the Common Benefits Clause. Rather, the decision was fundamentally about the legal consequences of marriage, its protections, benefits, and responsibilities. In his judgment, this bundle of legal incidents is what *Baker* compels for same-sex couples. He distinguished this from the Massachusetts case, *Goodridge*, which focused on marriage in a holistic, all-encompassing way.

Teachout contrasted the *Opinion of the Justices*, in which the Massachusetts Supreme Judicial Court found civil unions are not equal to marriage, and *Kerrigan*, in which a Connecticut Superior Court found no significant difference between civil unions and marriage, in an effort to ascertain why two courts which were presented with the same question would come to different conclusions. Differences in state constitutional provisions, different modes of analysis, and different approaches to constitutional philosophy and judicial functions all may have played a part. This is why, according to Teachout, it is not only permissible but appropriate for the Vermont General Assembly to come to its own conclusion about what the constitution requires in terms of equality.

Professor Teachout concluded his remarks by noting that, in his opinion, *Baker* requires equality between those with marriages and those with civil unions. He said that the General Assembly and the Court each have their own role and authority to determine what constitutes "equality" and that the General Assembly is provided with far greater latitude in which to make that determination. He urged the General Assembly to evaluate the civil union law by looking at Article 7 of Chapter I of the Vermont Constitution and

to make its own judgment about equality and fairness, perhaps with the result of a voter advisory referendum as part of a public education process.
(Professor Teachout's written testimony can be found at Appendix D.)

Monte N. Stewart, Esq.

Mr. Stewart presented the case for marriage as a vital social institution whose meaning and value are intrinsically, inseparably, and universally (across time and geography) bound to the traditional legal and social union of one man and one woman. Mr. Stewart said that this meaning of marriage yields important and valuable "social goods" for our society, including the optimum family structure for nurturing and raising of children. He spoke of the right of a child to grow up with and bond with his or her biological mother and father as interwoven with the social goods derived from traditional marriage.

For Stewart, "the man/woman meaning [of marriage] is essential to the production of these social goods. … If the union of a man and woman ceases to be a core constitutive meaning of marriage, that institution, probably sooner rather than later, will cease to provide those particular social goods." Stewart said that even if the Vermont legislature were to enact same-sex marriage, same-sex couples would not be brought into the social institution of traditional marriage. The enactment of "genderless marriage" would, however, suppress or de-institutionalize the established meaning of marriage, and result, in time, in a loss of the social goods associated with traditional marriage.

> *Vermont will certainly not be the happy home of many different marriage norm communities, each doing its own marriage thing, each equally valid before the law, and each equally secure in its own space. Rather, Vermont will have one marriage norm community (genderless marriage) officially sanctioned and officially protected; all other marriage norm communities will be officially disdained, and sharply curtailed. Moreover, there are profound problems with the notion that supporters of the old marriage institution can, if they want, just huddle together in some linguistic, social, or religious enclave to preserve the old institution and its meanings.*

Stewart agreed with the other presenters that a Vermont marriage license would not afford a gay or lesbian couple any more legal rights at the state level and that Vermont has no authority to alter a couple's federal benefits, protections, rights, and obligations. The only "non-speculative 'advantage'" of a marriage license would be to grant a couple legal standing to seek recognition of that Vermont same-sex marriage in another jurisdiction. He said the "real reason for the marriage battle in Vermont" is the *social* benefits, protections, rights, and obligations and that proponents of same-sex marriage are incorrect when they assert that inclusion of gay and lesbian couples within the marriage laws will enhance the social status and well-being of those families.

> *Vermont law has no power to usher same-sex couples into the venerable man/woman marriage institution; all Vermont law can do is suppress the man/woman institution, fabricate in its place the radically different genderless*

regime, and then assure that the marriage of no couple in this State (whether man/woman or same-sex) is legitimate unless sanctioned by that regime.

Stewart said that with respect to the federal DOMA, all legal challenges to date have failed and that he believes the law would be upheld if it were before the U.S. Supreme Court. In regard to the state DOMAs, Stewart said 20 of 21 appellate courts that have addressed the issue have upheld bans against same-sex marriage, including nine decisions
post-*Goodridge*. In addressing both the *Goodridge* and *Baker* decisions, Stewart indicated that these cases were an anomaly and said that both courts used a similarly flawed approach to reach a predetermined result.

Stewart referred the Commission to his published law review articles on the subject for a more detailed explanation of his position on same-sex marriage and subsequently provided the members with copies of his article "Marriage Facts."[49]
(Mr. Stewart's written testimony can be found at Appendix E.)

Professor Michael Mello

Professor Mello told the Commission that the thesis of his presentation would be that "[t]he time has come to give civil unions a respectful burial."

The burial must be respectful: recognizing that, in 2000, civil unions were a courageous and pioneering step in the journey toward marital equality between same-sex and opposite-sex couples, and recognizing as well that a legislator's vote for civil unions in 2000 was nothing short of heroic…But it must be a burial. Same-sex marriage in Vermont is an idea whose time has come.

Professor Mello said that "political reality" in 2000 was, in his judgment, the only reason for the separate legal status of civil unions. He recounted the "backlash" to the *Baker* decision and the political fallout for legislators who supported civil unions. It was a tumultuous time that he believes "unleashed an avalanche of homophobia in Vermont…Gay marriage was perceived to have been not politically possible."

Mello discussed the evolution of gay marriage in Massachusetts and why the Massachusetts Supreme Judicial Court rejected civil unions. He explained that after that Court ruled that the state constitution required same-sex marriage, the Massachusetts Senate began considering a bill to enact civil unions. The Senate requested an advisory opinion from the Court as to whether such an enactment would satisfy its decision in *Goodridge*. As Professor Johnson had noted earlier, the Court concluded that creating a separate system for delivering marital benefits to gay and lesbian couples would be unconstitutional because "separate is seldom, if ever, equal."

Mello believes that the Massachusetts court was correct in its analysis and that Vermont's civil union law fails the Common Benefits Clause's mandate for equality

under the law as well. The inequalities include the stigmatization, or "badge of inferiority," experienced by civil union couples compared to their heterosexual colleagues who have access to marriage and its history and social status. Mello noted that during the civil union debates in the legislature, supporters of the compromise made a point of telling opponents that civil unions were not the same as marriage and went further to define marriage as the union of "one man and one woman" three times in Act 91. Mello said that

> *because this demarcation was at the core of the arguments made by the statute's legislative supporters, the new law sends same-sex couples the same message of second-class matrimonial citizenship that the separate-but-equal doctrine sent to racial minorities in the six decades before Brown v. Board of Education.*

Permitting gay and lesbian couples to marry in Vermont would provide those couples with legal and practical benefits, specifically as they relate to the issue of portability, said Mello, in part because same-sex marriage in Massachusetts is limited to residents of that state. Mello hypothesized that because Vermont civil unions are open to out-of-state couples, perhaps Vermont same-sex marriages would be as well, which would provide those out-of-state couples the opportunity to test the issue of portability in their home states and in the U.S. Supreme Court.

In conclusion, Professor Mello said that he would encourage the general assembly to take up the issue and to try to enact full access to marriage for gay and lesbian couples. If the legislature fails to take action, he suggested that he expects the constitutionality of civil unions will be before the Vermont Supreme Court again and that the Court would ultimately find that Act 91 violates the Vermont Constitution for the same reasons the Massachusetts Court found civil unions to be inadequate under its constitution. *(Professor Mello's written testimony can be found at Appendix F.)*

Additional Submissions

In addition to the many letters and email messages expressing "pro" and "con" views on the ultimate question of whether Vermont should open its marriage laws to gay and lesbian couples, the Commission received a few submissions of note that impact the Commission's consideration of its charge with respect to the legal and practical challenges faced by same-sex couples joined in civil union as compared to heterosexual married couples. We address these here in brief and include copies of them in the appendix.

Jacqueline S. Weinstock, Ph.D.

University of Vermont Professor Jacqueline S. Weinstock sent a letter to the Commission on behalf of herself and sixteen University social sciences and education faculty members. In it she reviewed the last 20 years of social science research on same-sex parented families and took issue with sampling and data analysis methods of studies that "demonstrate negative outcomes to children raised in same-sex parented families."

The letter addresses five common concerns of those who oppose extending marriage to same-sex couples and asserts that children raised by same-sex parents are, by and large, no different than their peers who are raised by opposite-sex parents. The letter's conclusion is that the peer-reviewed studies support the conclusion that the quality of family life is more important than family structure. (Appendix at G). She said:

> *If we as Vermonters are mainly concerned with the welfare of all children, we would take heed of the broadly accepted conclusion among social scientists based upon the available knowledge to date, that "family structure, in itself, makes little difference to children's psychological development. Instead, what really matters is the quality of family life."*

Vermont Secretary of State Deborah L. Markowitz

Deborah L. Markowitz explained in a letter to the Commission that she is one of the state officials who respond to inquiries about civil unions because of her office's regulation of town clerks who issue civil union licenses and justices of the peace who perform civil union ceremonies. She said she has responded to numerous telephone calls and emails from people inquiring about the validity of a Vermont civil union in other states and to "many questions about whether individuals who were not resident[s] of Vermont could dissolve their Vermont civil unions." In order to obtain a dissolution of a civil union or a divorce in a marriage, one of the parties must be a resident of Vermont for at least one year. Because marriages are universally recognized in all jurisdictions, a couple who marries in Vermont can get a divorce anywhere. However,

because recognition of civil unions is limited outside of Vermont, a couple who obtains a civil union in Vermont is significantly restricted in its ability to have its union dissolved and may have to move to Vermont or another jurisdiction that recognizes the union to do so. Ms. Markowitz wrote that she has concluded that "individuals who have obtained a civil union in Vermont do not experience the same benefits as those individuals who have a Vermont marriage. Specifically, a [civil union] couple who leaves the state often ends up in legal limbo." (Appendix at H).

Beth Robinson, Esq.

Attorney Beth Robinson testified at the Commission's Bennington hearing and submitted a letter dated February 27, 2008. Ms. Robinson was co-counsel to the plaintiffs in *Baker v. State* and chairs the Vermont Freedom to Marry Task Force, an advocacy organization. Ms. Robinson identified six areas in which she finds the civil union law deficient, and in each she cited specific examples where the status of civil marriage would bring tangible, positive changes to civil union couples, including:

1. A host of privately conferred financial benefits and protections awarded by third parties on the basis of marriage (including health insurance).
2. Security in traveling from state to state (sometimes called "portability").
3. Critical federal protections (including social security survivor benefits, family-friendly immigration laws, and benefits for military spouses).
4. Participation in an institution that carries considerable personal significance for many, and undeniable social significance.
5. A legal status that is widely understood throughout the country and the world, communicating familial commitment.
6. Inclusion and equality. (Appendix at I).

The Commission notes that one of the key issues before it is whether, and to what extent, tangible changes would occur simply with the enactment of same-sex marriage in Vermont. The unambiguous testimony of over 240 Vermonters around the state is that they want an opportunity to show that such a change in law would make a difference in their daily lives.

Report of the Vermont Civil Union Review Commission

Although the final report of the Vermont Civil Union Review Commission was released six years ago, we mention it here as a reminder that a good deal of careful work was done in 2000-2001 to examine the implementation of Act 91 and its impacts on the state during that period. That report contains findings and recommendations that may give perspective to this report. Among its conclusions was that Vermonters with civil unions should expect continued nonrecognition of their status under federal law.

The Commission's Findings

Although the Commission did not undertake a scientific public opinion poll, the Commission's careful listening process lays the foundation for certain findings, or conclusions, with a strong degree of credibility. In some cases, the findings are statements to which the witnesses testified. In other cases, the findings are statements of fact about the legal consequences of civil unions in Vermont.

1. Those who testified in support of full access to marriage for gay and lesbian couples far outnumbered those who testified in favor of maintaining the civil union status quo or against same-sex marriage.

2. Vermonters who chose to attend the Commission's hearings on the equality of civil unions and whether Vermont should permit same-sex marriage have strong feelings about the issues. At first blush, this may seem obvious or inconsequential but the Commission believes that it bears further comment. While the civility of the hearings was evident, both "sides" continue to believe passionately in their respective judgments and understandings.

3. Vermonters with civil union licenses testified that they are being denied the full promise of Act 91. They have encountered a multitude and variety of instances where they find the promise of equality to be unfulfilled. They find many of these instances to be significant, if not substantial, deficits in the civil union law, with clear and negative financial, economic, and social impacts on their lives and the lives of their children and families. In addressing the Commission's charge, these witnesses find "legal and practical challenges [with civil union]… as compared to heterosexual marriage couples."

4. The legal recognition of same-sex relationships varies greatly from state to state. Eight states currently recognize a Vermont civil union, while four states recognize a Massachusetts same-sex marriage. Recognition of these relationships has taken the form of statute, judicial decision, and attorney general opinion, but it has been outnumbered by the legislative and electoral efforts to prohibit such recognition. Forty-four states and the federal government have adopted various "Defense of Marriage" statutes, constitutional amendments, or both to deny legal recognition to same-sex marriages.[50] An additional 17 states prohibit recognition of a civil union.

5. Regardless of formal recognition in some states, the legal status of parties to a civil union is generally foreign and difficult to explain when Vermonters travel to other states. These hurdles to the "portability" of civil unions can be either a minor or major inconvenience but can also present more dire consequences when the health and welfare or fundamental legal rights of a member of a civil union couple is at stake.

6. While the testimony identified clear, significant differences between the benefits, privileges, and responsibilities attached to a civil union versus a heterosexual marriage,

the extent to which enactment of same-sex marriage would eliminate these differences is not clear. That is, a Vermont same-sex marriage could share many, perhaps most, of the deficiencies of a Vermont civil union, considering the non-recognition of both by federal law and by the laws of all but a handful of the states. However, the Commission finds that such a change in the law would give access to less tangible incidents of marriage, including its terminology (e.g., marriage, wedding, married, celebration, divorce), and its social, cultural and historical significance. This also would likely enhance the portability of the underlying legal consequences of the status. Further, providing statutory access to marriage would be a clearer and more direct statement of full equality by the state, a statement of full inclusion of its gay and lesbian residents in the bundle of rights, obligations, protections, and responsibilities flowing from the status of civil marriage. The tangible same-sex marriage benefits described by Beth Robinson in her testimony and letter raise serious questions about the operation of the civil union law and warrant additional research and serious attention.

7. As requested in the Commission's charge, we find that the basis for Vermont's separate legal structures – marriage and civil union – is a combination of the passionate, volatile political dynamics prevailing in the General Assembly in 2000 and the belief that a separate legal structure in the form of Act 91 remedied the constitutional flaw declared in the *Baker v. State* decision.

8. The two legal statuses have different social and historical significance. "Marriage" evolves and carries the benefits and burdens of thousands of years of human experience unique to a male-female social institution. The testimony underscored why lesbian and gay couples desire access to the word "marriage," its current and historical meaning and significance, and how they and many others believe that it is their constitutional right. The testimony from the small number of persons who testified to the contrary revealed the passion with which they wish to exclude same-sex couples from access to this word. This testimony, in nearly every case, was based expressly on religious beliefs and faith.

9. The social science of the relative benefits or harms of heterosexual versus homosexual marriage for families and children is beyond the scope of the Commission's charge. There is credible social science research supporting the conclusion that raising children in a gay or lesbian coupled family, per se, has no negative impacts on the well-being of children. As noted below, the Commission believes that this area deserves further study.

The Commission's Recommendations

1. Areas for Additional Study and Review.

The Commission's hearing process provided a forum around the state for Vermonters to express their views on how the civil union law is working and on whether Vermont should permit gay and lesbian couples access to civil marriage. The process was a simple and straightforward one of asking Vermonters to testify and of listening to their thoughts, views, and concerns. The Commission took best advantage of the time available from its volunteer membership, and while our methods were not scientific, the Commission believes this report fairly reflects what is in the hearts and minds of Vermonters.

Nonetheless, the Commission recommends further study and review of the following areas:

- What has been the experience of the Massachusetts lesbian and gay couples who have married under Massachusetts law? Are these couples successfully obtaining all of the rights, privileges, and benefits of marriage – under Massachusetts law, federal law, and the laws of other states? Are their marriages more readily understood and more portable than a Vermont civil union?

- Can the Vermont income tax system be revised by statute or administrative action to ease the burden that civil union couples face in preparing and filing their returns?

- What is the best science available today on the different impacts on children raised in different family structures? Is there a consensus in the research community? How should social science affect the debate over same-sex marriage? How can the research be scrupulously and objectively evaluated before it influences policy-making and legislative action?

- If Vermont were to move to full access to marriage for Vermont's lesbian and gay couples, how should the state address the many civil union licenses already issued? Should civil union status remain for those who may want it? Should a civil union couple seeking marriage be required to waive or rescind that license at the time of joining in civil marriage? Or should a civil union couple's license be automatically converted by statute to a marriage license? These are only a few of what are likely to be many such transition questions should Vermont enact same-sex marriage.

2. The Commission's charge does not ask it to make a specific recommendation on whether Vermont should grant gay and lesbian couples access to civil marriage. The

Commission believes that making such a recommendation would undercut the purpose and usefulness of its work and this report. Simply put, we were asked to listen to the testimony of Vermonters on these issues, to look at the legal issues, and to report on what we found. It is the role of Vermont's policy-makers and elected officials to read and reflect on this report and in their best judgment determine what steps to take in their role as public servants of the people of Vermont. Accordingly, the Commission does not reach that recommendation.

3. The Commission recommends that Vermont take seriously the differences between civil marriage and civil union in terms of their practical and legal consequences for Vermont's civil union couples and their families. Their testimony and the testimony of their friends and supporters was sincere, direct, impassioned, and compelling. Act 91 represents Vermont's commitment to the constitutional equality and fairness for these citizens, and Vermont should preserve and protect that commitment.

Acknowledgements

The Commission expresses its gratitude for the diligent and cheerful support of two persons. Michele Childs is the attorney from the General Assembly's Office of Legislative Council who provided research, drafting, and all-purpose assistance to the Commission and its members as the Commission toured Vermont. Her assistance was conscientious, insightful, and cheerfully given. Rosalind Daniels of the Legislative Council's administrative staff provided staff and administrative support to the Commission, keeping us organized and scheduled. She also compiled the record of the Commission's work, including the volumes of materials submitted over the last eight months.

The Commission members also are grateful for the opportunity to engage in the Commission's work, around the state in public hearings, in dialogue and debate with each other, and in careful reflection in preparing this report. We are hopeful that the Commission's work will be a guide to Vermonters now and in the future.

Respectfully submitted on behalf of the entire Commission, April 21, 2008.

Thomas A. Little, Chair

Endnotes

[1] http://www.leg.state.vt.us/workgroups/FamilyCommission
[2] 115 State Street, Montpelier, VT 05633; 802-828-2231.
[3] Act No. 135 of the 1991 Adjourned Session (1992).
[4] 744 A.2d 864 (1999).
[5] The Common Benefits clause states: "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal." Chapter I, Article 7, Vermont Constitution. See also the discussion of the Common Benefits Clause at pages 8-22 in the Vermont Supreme Court's decision, *Baker v. State* (Docket no, 98-032), December 20, 1999 (170 Vt. 194, 744 A. 2d 864).
[6] *Baker*, supra note 3, at 889.
[7] Act No. 91 of the 1999 Adjourned Session (2000).
[8] Id. at Sec. 40.
[9] 2002 Report of the Civil Union Review Commission. Copies may be obtained at http://www.leg.state.vt.us/misc/issues.htm
[10] *Same Sex Marriage, Civil Unions and Domestic Partnerships*, National Conference of State Legislatures, March 2008.
[11] Id.
[12] Connecticut, Massachusetts, New Jersey, New Mexico, New York, Rhode Island.
[13] Eight states have recognized a civil union from another jurisdiction and four states have recognized a same-sex marriage from another jurisdiction.
[14] 28 U.S.C. §1738C and 1 U.S.C.§ 7.
[15] Letter of Martha R. Rainville, March, 2008. The author of this letter noted that she is not the former Vermont National Guard Adjutant General.
[16] 15 V.S.A. § 1204(a).
[17] Letter of Kristin Williams Propp, M.A., Bennington, Vt., February 28, 2008.
[18] 163 U.S. 537; *overruled*, *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954) (separate educational facilities for black and white students are inherently unequal and therefore violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution).
[19] Testimony of the Right Reverend Thomas C. Ely, Episcopal Bishop of Vermont, Montpelier, Vt., December 18, 2007.
[20] Id.
[21] 15 V.S.A. § 1204(f).
[22] Letter of Lisa Rae, March, 2008.
[23] Marriages are "solemnized," while civil unions are "certified." Individuals in a marriage are "spouses," while individuals in a civil union are "parties to a civil union." Spouses get a "divorce," while parties to a civil union get a "dissolution."
[24] Letter of Bennett E. Law, Randolph, Vt., March 3, 2008.
[25] Letter of Ala B. Fletmarch, Coventry, Vt., March 2, 2008.
[26] Testimony of Madeleine and Naomi Winterfalcon, Monkton, Vt., February 11, 2008.
[27] Letter of Michael Freed-Thall, March 3, 2008.
[28] Letter of Jon J. Wittenbecher, Pownal, Vt.
[29] Testimony of Steven K-Brooks, Brattleboro, Vt., December 5, 2007.
[30] Letter of Reverend Bruce Johnson, Norwich, Vt., March 4, 2008.
[31] Testimony of Linda M. Maloney, Priest in Partnership, St. Matthew's Episcopal Church, Enosburg Falls, Vt., October 10, 2007.
[32] Id.
[33] Letter of Rev. Adrianne Carr, The First Congregational Church, Burlington, Vt., December 14, 2007.
[34] Testimony of Colleen Montgomery, Burlington, Vt., February, 2008.

[35] Letter of Mary Feidner, North Bennington, Vt., February 28, 2008.
[36] E-mail of Lou Magnani, October 15, 2007.
[37] Letter of Priscilla Mahnker, Lyndonville, Vt., November 22, 2007.
[38] Testimony of Rose Lepeltier, St. Albans, Vt., October 10, 2007.
[39] Letter of Donald and Lynette Cutting, Irasburg, Vt., January 21, 2008.
[40] Supra note 15.
[41] Supra note 13.
[42] 798 N.E.2d 941 (Mass.2003). The Massachusetts Supreme Judicial Court ruled that the state had no "constitutionally adequate reason" for denying marriage to same-sex couples. Instead of creating a new fundamental right to marry, the court gave the state legislature 180 days to change the law to rectify the situation.
[43] *Opinion of the Justices*, 802 N.E.2d 565 (Mass. 2004).
[44] *Id.* at 569-70.
[45] 909 A.2d 89 (Conn. Super. 2006).
[46] Commission staff counsel Michele Childs prepared a Memorandum to the Commission on Vermont recognition of same-sex marriages from other states, dated December 10, 2007. The Memorandum is at Appendix J. The Commission has subsequently learned that a Vermont family court has recognized a Canadian same-sex marriage for purposes of granting the couple, one of whom is a Vermont resident, a divorce.
[47] Vermont courts have held that a marriage contract will be interpreted in this state according to the laws of the state in which it was entered into, so long as to do so does not violate Vermont public policy. See *Poulos v. Poulos*, 169 Vt. 607, 737 A.2nd 885, 886 (1999).
[48] Supra note 13.
[49] 31 *HARVARD JOURNAL OF LAW & PUBLIC POLICY* 1 (Winter, 2008).
[50] Forty-one states have statutory DOMAs and 27 states have defined marriage as the union of one man and one woman in their state constitutions.

July 24, 2007

Dear William,

We are writing to inform you that we have created the Vermont Commission on Family Recognition and Protection to review and evaluate Vermont's laws relating to the recognition and protection of same-sex couples and the families they form.

We have formed this commission because strong families enhance Vermont's communities, and Vermont's laws should recognize, protect, and support families. We have also concluded that the movement for civil rights for gay, lesbian and bisexual Americans poses critical questions warranting thoughtful consideration.

A list of the commissioners and their contact information is attached. We've appointed Tom Little of Shelburne as chair.

We have asked the Commission, at a minimum, to study and evaluate the basis for Vermont's separate legal structures for recognizing and protecting same-sex couples versus heterosexual couples; the social and historical significance of the legal status of being "married" versus "joined in civil union;" and the legal and practical challenges faced by same-sex couples joined in civil union as compared to heterosexual married couples.

We expect that the Commission will obtain the input of a range of Vermonters on these questions, as well as scholars and other experts. We have asked the Commission to hold six public hearings throughout the State of Vermont for the purpose of receiving broad public input concerning these matters.

The Commission shall have the staff support of legislative council. The Commission shall complete its review, and present its recommendations for legislative or other action, to the Vermont House and Senate Committees on Judiciary on or before May 1, 2008.

Sincerely,

Gaye Symington
Speaker of the House

Peter Shumlin
Senate President Pro Tem

FOR IMMEDIATE RELEASE

Contact: Alexandra MacLean
802-828-2245 OR
Katie Manaras
802-828-3806

Speaker and Senate President Pro Tem Announce Formation of the Vermont Commission On Family Recognition and Protection

Montpelier, Vermont – July 25, 2007 - Vermont's House and Senate leaders have created a Blue Ribbon Commission to study Vermont's laws governing same-sex couples. Standing side by side, House Speaker Gaye Symington and Senate President Pro Tem Peter Shumlin explained that the Commission will be inviting Vermonters to speak at public hearings around the state, and will solicit input from a range of experts.

"We've been hearing from a lot of Vermonters who want gay couples to be treated exactly the same as heterosexual couples in our laws—that is, they believe same-sex couples should be allowed to get civil marriage licenses," Symington explained. "It is time to ask whether it is in Vermont's interest to continue to maintain a separate legal status for same-sex couples." Since 2000, the State of Massachusetts, and the nations of Canada, Spain, South Africa, the Netherlands, and Belgium have opened their civil marriage laws to same-sex couples.

"So much has changed since 2000 when we created civil unions in Vermont," Shumlin noted. "This is a good time to reopen the conversation about civil unions vs. marriage, and to hear how Vermonters feel about taking the next step to full marriage equity. A thoughtful and respectful dialogue will strengthen our state."

The Commission consists of ten members, including two current legislators Sen. John Campbell of Windsor County and Representative Johanna Leddy-Donovan of Burlington. Tom

Little of Shelburne, an attorney and a former member of the Vermont House, will serve as chair. Other Commission members are Mary Ann Carlson of Arlington, a counselor and former State Senator; Berton R. Frye of West Danville, owner of Frye's Quarry in West Danville; Former Governor Phil Hoff of Burlington; Barbara Murphy of Johnson, President of Johnson State College; Helen Riehle of South Burlington, Executive Director of Vermont Program for Quality in Health Care, Inc. and a former State Senator; Michael Vinton of East Charleston, polygrapher and a former member of the Vermont House; and Nancy Vogele of White River Junction, an Episcopal Minister in White River Junction. The Commission is expected to complete its work and present a report to the Vermont House and Senate Judiciary Committees by the end of April, 2008.

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To: Members of the Public Attending Hearings of
The Commission on Family Recognition and Protection
From: Tom Little, Chair
Date: February 11, 2008
Re: Format for February 11th Meeting and Hearing in Williston, Vermont

Welcome to the Commission's eighth public hearing. The Commission members are eager to listen to your testimony.

The "charge" given to the Commission is to hold public hearings around Vermont, to listen to citizens across our communities about three areas:

1. The basis for Vermont's separate legal structures for recognizing and protecting same-sex couples versus heterosexual couples.

2. The social and historical significance of the legal status of being "married" versus "joined in civil union."

3. The legal and practical challenges faced by same-sex couples joined in civil union as compared to heterosexual married couples.

The Commission also has been asked to study and assess these areas from the standpoint of our Constitution and laws.

Today, the Commission will start meeting at 5:00 with a 1 hour presentation on the background of the Civil Union law, including the Vermont Supreme Court's Baker v. State decision from late 1999, the legislative process in 2000, and the Civil Union Review Commission (which issued a report in January 2002). I will also give a synopsis of some of the testimony the Commission heard on October 29 at the Vermont Law School from four legal scholars who addressed the constitutional issues involved in the Commission's work. We hope to have time during this period to take your questions.

Starting at 6:30 pm, the Commission will take testimony. Please sign the sign-in sheet if you wish to testify. Depending on the number of persons who wish to testify, we are likely to impose a time limit of 2-3 minutes per person. You are welcome to leave your written remarks with us, to become part of the public record.

These issues stir passionate feelings. We request that your testimony be honest, open, and civil, and respectful of those who may not share your views. We also request that you not show your support of testimony by applauding, nor vocalizing your opposition to testimony.

Thank you.

Vermont Commission on Family Recognition and Protection
Meeting at Vermont Law School
October 29, 2007

Remarks by Greg Johnson
Professor of Law
Vermont Law School

On behalf of Vermont Law School I would like to thank you for agreeing to hold a hearing at the law school. This is a tremendous opportunity for our community to learn about an issue important to many Vermonters. You have previously distributed a set of questions you would like us to address. I will focus principally on the first three Commission questions. That is, I will discuss whether there are any differences in the legal rights that flow marriage and civil union in Vermont. Next I will discuss cases addressing interstate recognition of Vermont civil unions and Massachusetts marriages. Third, I will discuss the outcome of the few cases challenging the so-called Defense of Marriage Acts. Finally, I will offer my opinion on the basis for the separate system of civil union in Vermont.

I will make a push at the end for opening up marriage to same-sex couples, but overall I see my role as more informative than persuasive. I hope to get the Commission up to date on what has happened in Vermont and across the country since the legislature passed the landmark civil union law back in 2000.

1. What are the legal consequences as between marriage and civil union in Vermont? In terms of legal benefits, protection, rights and obligations, what does a marriage license deliver you that a civil union license does not? Do these differences raise any statutory, common law, or constitutional law issues?

I am a gay rights advocate. I support opening up marriage to same-sex couples. Yet my answer to your first question is that a marriage license would not deliver any more rights in

Vermont than a civil union license. Legally, civil union is exactly the same and completely equal to marriage. For this I let the civil union law speak for itself. It grants same-sex couples "all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage."[1] The law is comprehensive, it offers not some, many, or most, but "all the same" rights as are offered to opposite-sex couples. The law directs that a "party to a civil union shall be included n any definition or use of the terms 'spouse,' 'family,' immediate family,' 'dependent,' 'next of kin,' and other terms that denote the spousal relationship, as those terms are used throughout the law."[2] Couples in a civil union are responsible to each other in the same way as couples in a marriage. Couples seeking to dissolve their civil union must go to family court, just like couples in a marriage, and there the same "law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply[.]"[3] In the legal realm, rights matter, and in this regard the civil union law is not ambiguous. It provides same-sex couples with the entire package of rights and responsibilities associated with marriage, bar none.

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[1] VT. STAT. ANN. tit. 15 § 1204(a) (2005).

[2] *Id.* at § 1204(b).

[3] *Id.* at § 1204(d).

Of course, this does not mean sam-sex couples in a civil union in Vermont have the same rights as opposite-sex couples in a marriage. Not at all and not even close. There are some 1096 federal rights and benefits that available to married couples that the federal government denies to same-sex couples because of the Defense of Marriage Act. That Act, passed in 1996, has two short sections. The one relevant to this discussion states simply, "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband and wife."[4] What few court and administrative decisions as there have been have uniformly held that DOMA prohibits same-sex couples from accessing federal marital benefits. This is as true for same-sex couples in a civil union in Vermont as it is for same-sex couples in a marriage in Massachusetts. Opening up marriage to same-sex couples in Vermont would not change this sad truth.

[4] PL 104-199.

The harsh federal law has a spill-over effect even for state benefits. In particular, it can effect the health benefits companies offer to employees who are in a civil union. The civil union law requires insurance companies with family plans to offer coverage to same-sex couples under the same terms as they do married couples. However, a federal law called ERISA, or Employee Retirement Income Security Act, preempts most state laws relating to employee benefit plans. I am not an expert on ERISA by any means, and this forum is not the place to probe the niceties of this complex federal law. But it is enough for us today to know that most employers can hide behind ERISA if they do not want to extend benefits to the same-sex civil union spouses of their employees. Unfortunately, we saw this same thing happening in Massachusetts after same-sex marriage was allowed there. According to the Boston Globe, large corporations like General Dynamics, and FedEX are among the employers who do not provide the same health benefits to spouses of married gay workers in Massachusetts available to heterosexual married couples."[5]

Same-sex marriage advocates do make one interesting argument regarding the conferral of state benefits that is worth your attention. They argue that private employers will often "piggyback" on the state's definition of marriage in offering benefits. So, in the context of health care benefits, for example, if a company only offers these benefits to the married spouses of its employees, and Vermont opens up marriage to same-sex couples, then married same-sex couples will be entitled to the benefits unless and until the employers chooses to hide behind ERISA. To do so, it would have to take affirmative action. As long as same-sex couples only have civil union, the employer can rest on its policy of just extending coverage to married couples. That is, under today's system it would have to act to extend benefits to same-sex couples, whereas with

[5] Kimberly Blanton, *Firms Block Gays' Benefits, Cite US Law*, Boston Globe, December 18, 2004.

same-sex marriage it would have to act to deny benefits. Since inertia is often a factor in corporate decisions, perhaps more same-sex couples would gain these benefits through marriage than through civil union. This argument makes intuitive sense to me, yet the experience in Massachusetts has been that employers intent on discriminating against same-sex married couples will do so.

The vexing question that has divided courts is whether a separate system of marital rights and benefits for same-sex couples is *inherently* unequal and therefore violative of equal protection. The Vermont Supreme Court sent mixed signals about this question in *Baker v. State*. The court made clear that it was not ordering the state to issue the plaintiffs marriage licenses. In directing the legislature to craft a constitutionally acceptable solution, the court pointed to examples from other states that "establish an alternative legal status to marriage for same-sex couples," such as the Scandinavian registered partnership acts.[6] This is what the Vermont Legislature did with the civil union law. Still, the court left open the possibility that even this might not be enough. It suggested that "some future case may attempt to establish that–notwithstanding equal benefits and protections under Vermont law–the denial of a marriage license operates per se to deny constitutionally-protected rights[.]"[7] The plaintiffs in *Baker* moved for a voluntary dismissal of their action after passage of the civil union law, so this question remains unanswered in Vermont.

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[6] *Baker v. State*, 744 A.2d 864, 886-87 (Vt. 1999).

[7] *Id.* at 866.

Any party seeking to make such a claim would have to use the new jurisprudential test the court created n *Baker*. There, to the consternation of Justice Dooley, the court abandoned the well-known and "rigid" three tier tested used by the Supreme Court under the federal constitution. Under that test, laws which impact fundamental rights or so-called "suspect classes," such as classes based on race or alienage, are subject to strict scrutiny. Laws discriminating based on gender are subject to a less strict intermediate review, and all other laws, such as economic regulation, are subject to the easily met rational basis test. In *Baker*, the Vermont Supreme Court opted instead for a "balancing approach" which is sometimes called a sliding scale test, with these three categories melded together. Now, under the Common Benefit Clause, the court will first determine "the part of the community disadvantaged by the law" and then to the government's purpose for discriminating.[8] The court will measure the government's purpose against the importance of the right denied, and use "reasoned judgment" to decide if the discrimination is justified.

It was easy for the court to rule in plaintiffs' favor in *Baker* because the law deprived same-sex couples of hundreds of state-conferred rights, and the government's justifications failed to match this significant deprivation. Whether a law granting all the rights, benefits, and responsibilities of marriage but not the word itself violates the Common Benefit Clause under the new sliding scale analysis is a closer question.

Massachusetts Supreme Judicial Court certainly thought the word mattered. In a 4-3 vote, that court, citing *Brown v. Bd. of Education*, said flatly that separate is never equal.[9] The

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[8] *Id.* at 878-79.

[9] *Opinion of the Justices*, 802 N.E.2d 565 (Mass. 2004).

court used language drawn from the civil rights movement of the 1960's: "The dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to a second-class status. . . . The [civil union] bill would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits. . . . The history of our nation has demonstrated that separate is seldom, if ever, equal."[10]

[10] *Id.* at 569-70.

The Connecticut trial court, addressing the same question, had a different take. It said, "This court has been unable to find any case in which the mere difference in nomenclature applied to two groups merits" equal protection analysis. . . . Put another way," the court went on, "the fact that two similar groups–men and women, say–are referred to by two different names does not provide the basis for an equal protection or due process challenge."[11] The court distinguished *United States v. Virginia* (the VMI case) and other Supreme Court precedent on separate but equal by saying, "Though [plaintiffs] argue that separate is never equal, they have been subjected to no tangible separation at all, and the court rejects the argument that the *rhetorical* separation of marriage vs. civil union is enough to invoke an equal protection or due process analysis."[12]

2. What states, if any, officially recognize a Vermont civil union? Is the recognition statutory or judicial? Is the recognition full or partial, or circumstance-driven? Same questions about the federal government. Are there any differences compared to recognition of a same-sex marriage from Massachusetts, or Canada?

By my count, eight states currently recognize Vermont civil union in some manner. New Hampshire and California offer full recognition of Vermont civil union by statute. New Hampshire's civil union law states that a civil union or a same-sex marriage legally contracted outside of New Hampshire shall be recognized as a civil union in this state." California's domestic partnership law states that "A legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction, and that is substantially equivalent to a

[11] *Kerrigan v. State*, 909 A.2d 89, 98-99 (Conn. Super. 2006).

[12] *Id.* at 100.

domestic partnership . . . shall be recognized as a valid domestic partnership in this state regardless of whether it bears the name domestic partnership."

After Connecticut passed its civil union law, that state's Attorney General issued a formal opinion concluding that out of state civil unions would be fully recognized in Connecticut. The Attorneys General of New Jersey and New York have reached the same conclusion about recognition of out-of-state civil unions.

Vermont civil unions have been recognized judicially in what you call "circumstance-driven" situations in several states. In particular, courts seem inclined to dissolve civil unions upon the parties' request. This has happened in Massachusetts, West Virginia, and Iowa. In all these cases, the courts had to recognize the civil union first in order to dissolve it, prompting on gay law expert to call the phenomenon "divorce before marriage." A trial court in New York did recognize a civil union in a wrongful death action, but that decision was overturned on appeal. Courts in Georgia and one in Connecticut in a pre-civil union law case have also refused to recognize Vermont civil unions.

The one interstate recognition case you might be aware of is the *Miller-Jenkins* case. In that case, a female couple with ties to both Virginia and Vermont joined in civil union in Vermont, had a child, and a two years later filed an action in Vermont to have their civil union dissolved and to establish custody and visitation rights. After this action was filed, Lisa Miller-Jenkins, the biological mother of the child, filed another suit in Virginia, claiming that Janet had no rights to visitation because their civil union was void in Virginia. This case appeared to be heading for a constitutional showdown after the Vermont court ruled it had jurisdiction and gave Janet visitation rights, and the Virginia court said that Janet had no rights because Virginia didn't

recognize the civil union. On appeal, the Vermont Supreme Court affirmed Janet's visitation rights, concluding that the case was governed by federal statutes which sought to prevent forum shopping in child custody cases. In Virginia, the court of appeals agreed these federal statutes governed the case since the child had significant connections to Vermont and that's where state court custody determination was made. Couples joined in civil union shouldn't be too hopeful about this result since the federal statutes were determinative. In other recognition contexts, I would hazard that the chance of other states recognizing civil unions is slim.

As for Massachusetts marriages, they are recognized by statute in New Hampshire (as civil unions) and by Attorney General opinion in New Jersey (where they are considered as civil unions), Rhode Island, and New York (both those Attorney General Opinions treat the Massachusetts same-sex marriages as marriages, not civil unions). Vermont would also arguably recognize Massachusetts same-sex marriages as civil unions, according to Attorney General Sorrell. Trial courts in New York are split on the recognition issue. One court refused to recognize a Massachusetts marriage, relying on the New York Court of Appeals decision in *Hernandez v. Robles*, in which the court rejected plaintiffs' claim that they were entitled to same-sex marriage under the New York Constitution. Another trial court in New York has rejected the argument that *Hernandez* means Massachusetts marriages should not be recognized., since that's a Full Faith and Credit question, not a state constitutional law question. That court upheld a county executive order requiring county agencies to recognize out-of-state same-sex marriages. Both of these cases are on appeal in New York.

One New York trial court has recognized a Canadian marriage. Two courts, one in New Jersey and one in Washington state, have addressed the question and have refused to recognize Canadian same-sex marriages.

The intriguing question often asked is whether a civil union might stand a better chance of being recognized in another state than a same-sex marriage. This is what the Connecticut Attorney General concluded. He simply looked to the legislature's express ban on same-sex marriage, and said that this meant out-of-state same-sex marriages could not be recognized in Connecticut. Yet since the legislature had passed a civil union law, out-of-state civil unions would be recognized. The language of the California domestic partnership law would suggest the same result there. The countervailing argument is that civil unions are unlikely to be recognized for marital benefits in other states because a civil union is not a marriage. The very first line of the civil union law states that marriage is the union of one man and one woman. Worse, the law states that "a system of civil unions does not bestow the status of civil marriage." This is the line the Georgia court used to deny recognition, and it will likely loom large in any out-of-state recognition context. Still, it may well be the case that a court could use its equitable powers to recognize a civil union for limited purposes where it would not be able to recognize a same-sex marriage.

Still, the bottom line is that whatever the same-sex relationship is called, the chances of it being recognized in other states is slim. If I can offer a quick lesson on full faith and credit, the general rule is that marriages valid where celebrated are valid everywhere, unless a state has a "strong public policy" against the marriage. This public policy exception was often used in the South to refuse recognition of inter-racial couples in the days of Jim Crow, but since about the

1950's it is exceedingly rare for courts anywhere to refuse to recognize an opposite-sex marriage if it was valid where celebrated. This will not be the case for same-sex marriages. As I'm sure you know, following court successes in Hawaii, Vermont, and especially Massachusetts, many states passed there own versions of the DOMA. Today, 26 states have constitutional amendments limiting marriage to a man and a woman and 19 states have statutes to that effect. Seventeen states now have laws or constitutional amendments which go much further and prohibit recognition of any same-sex relationship. An example of this would be Nebraska's Constitutional Amendment, which reads, "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." State courts asked to recognize civil unions from Vermont or same-sex marriages from Massachusetts will no doubt turn to the laws and amendments as evidence of the state's strong public policy against recognition. One well-known scholar has posited that the public policy exception might be unconstitutional, but no court has ever come close to saying this, and the Supreme Court has made clear that states are not bound by the laws of other states under the Full Faith and Credit Clause. *See Nevada v. Hall*, 440 U.S. 410, 423-24 (1979) ("Full Faith and Credit does not . . . enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it."). Furthermore, Congress has used its powers under that clause to allow states not to recognize same-sex relationships. The first paragraph of the federal DOMA sates, "No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State

. . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State."

Where does this leave us? In a rather sorry state, as far as couples in a same-sex relationship are concerned. Unlike opposite-sex marriage couples, same-sex couples united in marriage or civil union cannot be certain their relationship will be recognized when they travel. This problem is very real in our mobile society and may be especially acute in Vermont, a small state with residents who frequently leave the state for services or other reasons. Yet we needn't assume same-sex marriages or civil unions will never be recognized. I highly recommend Andrew Koppelman's book, "Same Sex, Different States," for a perceptive analysis of the complexities of this issue. He argues that a simple rule of "blanket nonrecognition" in DOMA states does not capture the finer points of full faith and credit clause precedent. He divides recognition cases into 4 likely scenarios. First is what he calls "evasive marriages." This is when a couple travel to say Mass to get married and return home, never intending to live in Massachusetts or leave their home state, which does not recognize same-sex marriage. Koppelman believes that in this circumstance the home state has a right to refuse to recognize the marriage, under the public policy doctrine. It is a closer call, according to Koppelman, for "migratory marriages." That is, where couples were residing in mass when they were married but then moved to another state after that. Koppelman suggests that in these cases the new home state of the couple should be entitled to decide which "incidents" of marriage to afford the couple, and that if it is a right or responsibility the couple could have contracted for, such as hospital visitation rights and inheritance, it should be granted to them. But rights that only flow

from the operation of law, such as the right to file income taxes jointly, may rightly be denied. He offers the same result for "visitor marriages," where the couple is just passing through, and "extraterritorial marriages," where the parties have never lived in the state but has some property or other asset there. What is most interesting about Koppelman's book is his historical look at recognition of interracial marriages at the height of Jim Crow. At one time, 40 states had laws banning interracial marriage, many by constitutional amendment. Courts got quite exercised about this issue, and vented a lot of spleen, yet still there were cases that recognized interracial marriages in the latter three contexts. This hopefully is an encouraging signal to mobile same-sex couples that their marriage or civil union might be recognized elsewhere.

3. Challenges to DOMA.

There have only been a few reported cases, and they have all come out the same way. I am only aware of three cases, from Florida, California, and Washington State. The Florida case is illustrative of the trend. There, a lesbian couple went to Massachusetts and got married. As an aside, apart from DOMA concerns this marriage would appear to violate Massachusetts' evasion statute, which was upheld by the Supreme Judicial Court of Massachusetts in a case brought by same-sex couples from Vermont and other states challenging the law. In any event, this Florida couple sued in federal court arguing that the Florida had to recognize their marriage because the Florida and the federal DOMA were unconstitutional. First, the court concluded there is no fundamental right to same-sex marriage. Next, on the equal protection claim, the court used the traditional three-tiered approach I mentioned earlier. The court concluded that claims of sexual orientation discrimination are to be reviewed under the lenient rational basis level of review. From here, it is an easy step to uphold the DOMA's since under rational basis any conceivable

rationale for the law will suffice. The court accepted the government's assertion that DOMA "encourages the creation of stable relationships that facilitate the rearing of children by both of their biological parents."

In short, it is highly unlikely that DOMA will be struck down. Indeed, national gay civil rights groups would never consider bringing such a claim, and have gone so far as to file a brief in the renegade California case asking the court to dismiss it for lack of standing, since the couple there had already dissolved their domestic partnership.

The slightly closer question is that of whether the comprehensive state DOMA's that prohibit the recognition of not only marriage but all other forms for same-sex relationships are unconstitutional. The Nebraska constitutional amendment I quoted above was challenged in federal court on equal protection grounds after its passage. The trial court ruled in plaintiffs' favor, relying on *Romer v. Evans*. That was the famous 1996 Supreme Court case in which the Court struck down a Colorado constitutional amendment which would have banned any claims of discrimination based on sexual orientation at the state or local level. The Court held that such a broad-based, undifferentiated, constitutional disability directed at an unpopular group, for no other reason that pure animus, was a "denial of equal protection in the most literal sense." The amendment's sweep belied any legitimate purpose: "It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests." The Nebraska federal trial court used this language to strike down that state's DOMA. Here again, while the court held there could be a rational reason to limit marriage to a man and a woman, the broad sweep of the DOMA, extending to civil unions, domestic partnerships, and any other sort of legal arrangement ran up against the rule in *Romer*. This decision was reversed on appeal.

The Eighth Circuit applied the rational basis test to uphold the DOMA. It also felt *Romer* did not apply because the DOMA addressed only marriage, and not all claims of discrimination. Still, when you consider the hundreds and even thousands of rights that flow from marriage, the trial court's use of *Romer* to strike down the DOMA is plausible.

4. What is "the basis for Vermont's separate legal structures for recognizing and protecting same-sex couples versus heterosexual couples?

At the time of *Baker*, the Vermont Supreme Court stopped short of ordering the state to immediately open up marriage to same-sex couples because of a concern that a "sudden change in the marriage laws . . . may have disruptive and unforeseen consequences." This was a legitimate concern back in 1999 because at that time no state recognized same-sex marriage, civil union, or any other marital equivalent for same-sex couples. With the civil union law compromise, Vermont could chalk up yet another "first in the nation" accomplishment. Yet times have changed dramatically in just seven short years. What was once radical is now blase. Civil union laws are now passed with relatively little debate, and nowhere near the rancor we saw here. This is true even in New Hampshire. Massachusetts now has same-sex marriage, as do Canada, Holland, Belgium, Spain, and South Africa. In all of these places, opening up marriage to same-sex couples has not had any detrimental effect on the institution of marriage or on society.

The Vermont Supreme Court and Legislature wisely saw that an incremental approach to same-sex marriage would be the most productive and sensitive way to approach this divisive

issue. With the compelling testimony at the hearings on the civil union bill, Vermonters saw their neighbors, friends, and community leaders share their stories of what is was like to be in a same-sex relationship, and all the hardships that followed from not having that relationship recognized. The Legislature recognized these stories and others in its findings:

> Despite longstanding social and economic discrimination, many gay and lesbian Vermonters have formed lasting, committed, caring and faithful relationships with persons of their same sex. These couples live together, participate in their communities together, and some raise children and care for family members together, just as do couples who are married under Vermont law.

Over the ensuing years, Vermonters become accustomed to civil union. The concluding report of the Civil Union Review Commission confirmed that the new institution has had a negligible impact on existing government services, but has had marked, "very positive impact [the lives of couples joined in civil union] in numerous ways." The destabilizing effect the court was concerned with earlier is no longer a serious issue. Vermont led the way with civil union, but is now already behind the curve. Opening up marriage to same-sex couples would be the next logical–and far less divisive–step for Vermont.

I will close by saying it is my hope that if the legislature does the right thing and opens up marriage to same-sex couples, it doesn't do away with civil union, at least immediately. In my scholarship I have described the many merits of this new institution. Same-sex marriage advocates criticize it because it is new, and has nothing of the historical cache of marriage. Yet this is what I see as one of its advantages. It has none of the historical baggage of marriage either. I have defended it as an institution that the lesbian and gay community can call its own so that it is not subsumed in the dominant heterosexual paradigm. If marriage were opened up to

same-sex couples, then civil union would have to be opened up to opposite-sex couples, and so it would lose this unique, community-building feature. Still, I think we should keep it.

In this regard a comparison to Holland might be helpful. There, after same-sex marriage became legal in 2001, the government decided to leave the existing registered partnership act in place for five years, to determine if there was still a need for it. The registered partnership system in Holland is open to same and opposite sex couples. A study commissioned by the government at the end of the five year period showed that gay and straight couples continued to register for domestic partnerships even though they all had the option to marry. Among same-sex couples, after a surge in 2001 when same-sex marriage became legal, the numbers have tapered off, so that by 2005, 588 female couples and 570 male couples got married. The partnership numbers have remained constant for gay couples. In 2005, 329 female couples, and 279 male couples registered their partnerships, so roughly half the number as got married. For straight couples, the percentages are similar. In 2005, 10,699 couples got married, and 5744 became domestic partners. The study acknowledged these numbers could show a need for "a well-regulated formalised institution without the symbolism and tradition of marriage."

This is my point about civil union in Vermont. The institution remains viable. The numbers have been fairly steady since the surge in the first year of 2000. Since 2002, the numbers have ranged between 167 and 124 in-state. The out-of state numbers have declined from 1876 to 427. I am sure most of these couples would rather be married, but it would be hasty and incorrect to assume all of them would. Some would prefer an "well-regulated institution without the symbolism and tradition of marriage."

My progressive vision would go even further than this. I ascribe to model which would give couples a wide range of choices, from a limited set of rights and responsibilities, akin to the Hawaii Reciprocal Beneficiaries Act, to "marriage-lite," like France's Pac Civile, to perhaps even covenant marriages, like they have in Louisiana and Arkansas, where couples, once married, can only get divorced for cause, such as spousal abuse. The fullest flowering of freedom in relationship and familial choices would come when we break away from the limited, binary view of marriage or nothing. This of course is exactly the worst-case scenario opponents of same-sex marriage say will happen if we open up marriage to same-sex couples, but I am not afraid of it. I am not one of these people who say government should get out of the marriage business, but I do believe the centuries-long lesson of liberal society has been toward a greater freedom of choice when it comes to deciding on the appropriate level of commitment with a life partner.

VERMONT COMMISSION ON FAMILY RECOGNITION AND PROTECTION
Monday, October 29, 2007
Chase Center, Vermont Law School

Testimony of Professor Peter Teachout

"The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity."

Baker v. State, 744 A.2d 864, 889 (1999)

I. Introduction

II. Does the establishment of civil unions for same-sex couples as an alternative to marriage violate the Vermont Constitution: What does Baker v. State say?

> "While some future case may attempt to establish that - notwithstanding equal benefits and protections under Vermont law - the denial of a marriage license operates per se to deny constitutionally-protected rights, that is not the claim we address today.
>
> "We hold only that plaintiffs are entitled under . . . the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples."
>
> Baker v. State, 744 A.2d 864, 886 (1999)

III. The role of the court versus that of the state legislature in carrying forward the Vermont constitutional tradition in this area: a collaborative relationship.

> "When a democracy is in moral flux, courts may not have the best or the final answers. Judicial answers may be wrong. They may be counterproductive even if they are right. Courts do best by proceeding in a way that is catalytic rather than preclusive, and that is closely attuned to the fact that courts are participants in the system of democratic deliberation"
>
> Baker v. State, 744 A.2d 864, 888 (1999)

IV. Rulings in other states compared: Opinion of the Justices (Massachusetts Supreme Court, 2004) and Kerrigan v. Connecticut (Connecticut Superior Court, 2006).

A. Opinion of the Justices (Mass. 2004): advisory opinion, in which Mass. Ct. held, 4-3, that civil union not equivalent to marriage.

"[S]eparate is seldom, if ever, equal."

Proposed civil union law "would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits."

It would have the effect of "assigning" same-sex couples "to second-class status."

B. Kerrigan v. Connecticut (2006). Connecticut Superior Court found no constitutionally significant differences between civil union and marriage.

C. What accounts for the different outcomes in these two opinions?

1. Differences in state constitutional textual provisions?

2. Differences in modes of analysis?

3. Differences in state constitutional philosophy?

a. Role of courts in development of state constitutional law:

i. Massachusetts: protection of rights exclusively a judicial function.

ii. Vermont and Connecticut: allowing some role for participatory democracy ("judicial humility").

V. Key differences between "civil unions" and "marriage":

A. "Portability"

B. Other tangible benefits and advantages

C . "Separate but equal": how does establishment of distinct category of civil union compare with system of institutionalized racism which existed in the South?

D. The importance and constitutional relevance of "intangibles":

"Elizabeth Kerrigan . . . feels the government views her relationship as unequal to and less worthy than a heterosexual marriage. Carol Conklin feels that "civil unions say to me that I am . . . not good enough for marriage." Jeffery Busch feels that he is "an outsider and a second-class citizen, in the eyes of the government

> and society generally," a feeling that to him is "humiliating." [Other plaintiffs] are concerned because "civil unions do not have anywhere near the same common cultural recognition and respect that marriage has." [To others] the concept of civil union "feels inferior and demeaning" compared to marriage."
>
> From Kerrigan (Connecticut case), at p. 62

VI. Legislative determination as to what Vermont constitution requires allows much greater latitude than courts have in making a constitutional ruling.

A. Still, in determining what the Vermont constitution requires, the legislature should be guided by pertinent constitutional directives:

1. The "Common Benefit" Clause:

> "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community . . ."

Vermont Constitution, ch. I, art. 7

2. The "Prudential" Clause:

> "That frequent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the blessings of liberty."

Vermont Constitution, ch. I, art. 18

B. Standards of Review irrelevant

C. Free to consider intangible as well as tangible differences

D. Legislature has not just the right but the responsibility to carry the Vermont constitutional tradition forward

V. An "advisory referendum"?

A. Historic practice (see Paul Gillies, The Role of Voters in Legislation).

B. Advisory referendum constitutionally sanctioned by Court:

> [Such referenda as the General Assembly have established are "not only proper and legal, and just and moral, but highly commendable and creditable to the legislature who passed the statute, for, at the very threshold of inquiry into the expediency of such a law, lies the other and more important inquiry, are the people prepared for such a law?"
>
> Chief Justice Isaac Refield, State v. Parker, 26 Vt. 357 (1854)

C. What purposes served by an advisory referendum?

D. Suggested language:

"Shall the voters advise the General Assembly to consider [adopt] legislation eliminating the current dual track of civil union and marriage and replacing it with a single system of marriage available to all couples [otherwise entitled to all the rights and privileges associated with marriage under the Vermont constitution] to be effective January 1, 20__."

Written Statement
of
Monte Neil Stewart
to the
Commission on Family Recognition and Protection

*** * * * * ***

October 29, 2007

Vermont Law School

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Executive Summary

1. Marriage is a vital social institution and, like each important social institution, is made up of a unique web of widely shared public meanings.
2. These "institutionalized" meanings teach, form, and transform individuals, providing them with identities, purposes, projects, and ways of behaving and relating to others. In this way, these meanings provide valuable social goods.
3. Across time and cultures, *the union of a man and a woman* has virtually always been a core meaning constitutive of the nearly universal marriage institution.
4. The man/woman meaning continues as a widely shared ("institutionalized") meaning at the core of the contemporary Vermont and American marriage institution.
5. The man/woman meaning is essential to the production of a number of the valuable social goods that the marriage institution provides our society. Those social goods include effective protection of the child's bonding right, that is, the right of every child to know and be brought up by his or her biological parents, with exceptions only in the best interests of the child, not those of any adult; optimal provision of private welfare to children conceived by passionate man/woman sex; an effective way over the male-female divide; the source of the identity and status of *husband* and *wife*; and others.
6. If *the union of a man and a woman* ceases to be a core constitutive meaning of marriage, that institution, probably sooner rather than later, will cease to provide those particular social goods.
7. The law does not have the power to usher same-sex couples into the man/woman marriage institution, but the law certainly has the power to suppress the man/woman meaning, thereby "de-institutionalize" man/woman marriage, and fabricate in its place a genderless marriage regime built around the law-mandated meaning of "the union of any two persons."
8. A genderless marriage regime is radically different from the man/woman marriage institution, as evidenced by the large divergence in the nature of their respective social goods. It could not be otherwise because genderless marriage is radically different in what it aims for and in what it teaches.

9. At any one time, Vermont can have one, but only one, of three alternatives: the man/woman marriage institution, a genderless marriage regime, or no normative marriage institution at all. Vermont must choose which one; two of these alternatives at the same time amounts to an impossibility. Vermont has always chosen man/woman marriage and done so legislatively as recently as 2000.

10. Because of the social institutional realities just summarized, the serious intellectual debate about man/woman marriage versus genderless marriage has been over for some time, with man/woman marriage the clear victor.

11. Moreover, those social institutional realities are, in large measure, the reason 20 out of 21 American appellate court decisions have upheld the constitutionality of man/woman marriage and refused to mandate genderless marriage – including the nine most recent such decisions.

12. The social institutional realities just summarized are also the basis for Vermont's choice of the man/woman marriage institution (and the unavoidable rejection of the other two alternatives) and for Vermont's implementation of civil unions to meet the perceived needs of same-sex couples.

13. Under the present state of the law in Vermont and across the Nation, for Vermont to switch to a genderless marriage regime will provide virtually ***no*** new tangible, meaningful legal benefits to same-sex, civil union couples who enter that regime.

Written Statement of Monte Neil Stewart

My thanks to the Commission for the invitation to participate with distinguished and able colleagues in today's session.

I am aware that controversial questions concerning pre-judgment, partiality, and bias have swirled around the Commission since the announcement of its constituent members. I am not here to address those questions. In that vein, it would be wrong for anyone to view my presence and participation here today as some kind of position statement relative to that controversy. The sole purpose for my presence and participation is to share information and understanding germane to this great public issue: Should Vermont law sustain the man/woman meaning at the core of this State's vital social institution of marriage, or, rather, should Vermont law suppress that institutionalized meaning and replace it with the "any two persons" meaning? Or, in short, should Vermont continue with the man/woman marriage institution or instead move to a genderless marriage regime?

In a moment, I will give answers to the questions that the Commission previously posed to today's participants. First, however, both to identify common ground and to sharpen key concepts, I will provide foundational information.[1]

Regarding common ground, there is indisputably this: Marriage is a vital social institution. Indeed, those six words begin Massachusetts's *Goodridge* decision. Thus, marriage, like all social institutions, is constituted by a web of shared public meanings. It is these institutionalized meanings that teach, form, and transform individuals, providing identities, purposes, and projects and guiding behavior. In this way, these institutionalized meanings provide valuable social goods. Indeed, it is exactly because social institutions – examples being private property, money, marriage, elections – provide valuable social goods that society and its laws sustain them.

Across time and cultures, a core meaning constitutive of the marriage institution has virtually always been the union of a man and a woman. This core man/woman meaning is powerful and even indispensable for the marriage institution's production of at least six of its valuable social goods. The man/woman marriage institution is:

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[1] This foundational information is set forth in detail and is rather fully elaborated in a series of my articles and in the authorities cited and reviewed in those articles. Citations to those articles may be found in footnotes 3 and 5 of Monte Neil Stewart, *Marriage Facts*, 31 HARV. J.L. & PUB. POL'Y xx (2007), a copy of which I previously provided Commission members and today's participants.

1. Society's best and probably only effective means to make real the right of a child to know and be brought up by his or her biological parents (with exceptions justified only in the best interests of the child, not those of any adult) – what I call "the child's bonding right."
2. The most effective means humankind has developed to maximize the private welfare provided to children conceived by passionate, heterosexual coupling (with "private welfare" meaning not just the basic requirements like food and shelter but also education, play, work, discipline, love, and respect).
3. The indispensable foundation for that child-rearing mode—that is, married mother/father child-rearing—that correlates (in ways not subject to reasonable dispute) with the optimal outcomes deemed crucial for a child's—and therefore society's—well being.
4. Society's primary and most effective means of bridging the male-female divide.
5. Society's only means of conferring the identity of, and transforming, a male into husband/father and a female into wife/mother statuses and identities particularly beneficial to society.
6. Social and official endorsement of that form of adult intimacy—married heterosexual intercourse—that society may rationally value above all other such forms. That rationality has been demonstrated in the scholarly literature and remains, to date, unrefuted.

With its power to suppress social meanings, the law can radically change and even deinstitutionalize man/woman marriage, with concomitant loss of the institution's social goods. Further, genderless marriage is a radically different institution than man/woman marriage, as evidenced by the large divergence in the nature of their respective social goods (in the case of genderless marriage, only promised, not yet delivered). Indeed, observers of marriage who are both rigorous and well-informed regarding the realities of social institutions uniformly acknowledge the magnitude of the differences between the two possible institutions of marriage, and this is so regardless of the observer's own sexual, political, or theoretical orientation or preference.

Another social institutional reality is that a society can have, at any one time, only one social institution denominated *marriage*. That is because a society, as a simple matter of reality, cannot, at one and the same time, have as shared, core, constitutive meanings of the marriage institution "the union of a man and a woman" *and* "the union of any two persons." A society, as a simple matter of reality, cannot, at one and the same time, tell people, and especially children, that *marriage* means "the union of a man and a woman" *and* "the union of any two persons." The one meaning necessarily displaces the other. Hence, every society

must choose either to retain the old man/woman marriage institution or, by force of law, to suppress it and put in its place the radically different genderless marriage institution. But to suppress, by force of law, the shared public meanings constituting the old institution is to lose the valuable social goods flowing from those institutionalized meanings. Thus, social institutional realities refute the "no-downside" argument advanced by genderless marriage proponents and seen in the famous tactic of asking: "How will letting Jim and John marry hurt Monte's and Anne's marriage?"

These social institutional realities further reveal phrases like *gay marriage* or *same-sex marriage* to be misleading, in two related ways. First, nowhere in the world is marriage defined legally, socially, or otherwise as the union of two persons of the same sex. It is defined either as the union of any two persons, as in Massachusetts (at least legally), or as the union of a man and a woman, as in the other 49 states (both legally and socially). Second, when people confront the marriage issue, the *same-sex marriage* term and the others like it get those people thinking of a new, different, and separate marriage arrangement or institution that will co-exist with the old man/woman marriage institution. But once the legislature adopts "the union of any two persons" as the legal definition of civil marriage, that becomes the *sole* definitional basis for the *only* law-sanctioned marriage any couple can enter, whether same-sex or man/woman. Thus, as will become even more clear later on, legally sanctioned genderless marriage (the not-misleading term for what is being proposed), rather than peacefully co-existing with the old man/woman marriage institution, actually displaces and replaces it.

Further, after legislative adoption of genderless marriage, Vermont will certainly *not* be the happy home of many different marriage norm communities, each doing its own marriage thing, each equally valid before the law, and each equally secure in its own space. Rather, Vermont will have one marriage norm community (genderless marriage) officially sanctioned and officially protected; all other marriage norm communities will be officially constrained, officially disdained, and sharply curtailed. Moreover, there are profound problems with the notion that supporters of the old marriage institution can, if they want, just huddle together in some linguistic, social, or religious enclave to preserve the old institution and its meanings. Social institutional studies teach that the dominant society and its language and meanings will, like an ocean and its waves, inevitably wear down and cause to disappear any island enclave of an opposing norm. To the degree that members of the enclave were to adopt the speech of the dominant society, they would lose the power to name, and in large part the power to discern, what once mattered to their forbears. To that degree, their forbears' ways would seem implausible to them, and probably even unintelligible.

What I have just summarized rather severely is known in the literature as the social institutional argument for man/woman marriage. Despite ample opportunity to do so, genderless marriage proponents have never honestly engaged and effectively countered that argument. Rather, they have tried to ignore it or otherwise evade it, such as by misstating component parts. Both the strength of that argument and the virtual absence of any genuine counter to it are why, in large measure, 20 of the 21 American appellate court decisions resolving constitutional claims to judicially mandated genderless marriage have rejected those claims and held man/woman marriage to be constitutional, including all nine American appellate court decisions decided since the *Goodridge* decision came down in November 2003. Moreover, those are the reasons it is fair and accurate to say that the serious intellectual debate over man/woman marriage versus same-sex marriage was over some time ago, with man/woman marriage the clear victor.

I now turn to the questions posed to us by the Commission.

1A. What are the legal consequences as between marriage and civil union in Vermont?

At the state level, there is no difference in legal consequences. That is because of the clear language of the Civil Union Act.

At the federal level, a Vermont marriage is now recognized as a "marriage" for all federal purposes and a Vermont civil union is not recognized as a "marriage" for any federal purpose. (The federal Defense of Marriage Act dictates this result.) Because of the nature of our federal system and because of the federal constitution's supremacy clause, Vermont has no power to change federal treatment of civil unions. Moreover, if Vermont were to redefine marriage here to the union of any two persons, same-sex couples marrying thereafter would still not be married for federal purposes.

1B. In terms of legal benefits, protections, rights and obligations, what does a marriage license deliver you that a civil union license doesn't?

If the adjective "legal" modifies (as seems to be the clear intent) "benefits, protections, rights and obligations," the answer at the state level is again "no differences," for the reasons just given. Also for the reasons just given, Vermont has no power to alter a same-sex couple's "benefits, protections, rights and obligations" governed by federal law.

If the adjective "legal" is cast aside and replaced by "social," then we get to the real reason for the marriage battle in Vermont. Genderless marriage proponents assert that allowing same-sex couples into marriage will enhance (in ways said to be beneficial to society generally) their social status and hence well-being. But this assertion collides with a number of social institutional realities. The first is that Vermont law has no power to usher same-sex couples into the venerable man/woman marriage institution; all Vermont law can do is suppress the man/woman marriage institution, fabricate in its place the radically different genderless marriage regime, and then assure that the marriage of no couple in this State (whether man/woman or same-sex) is legitimate unless sanctioned by that regime. But to take that radical approach is to assure, probably sooner rather than later, the loss of the valuable social goods now produced uniquely by the institutionalized man/woman meaning. That is a very high cost indeed, and that is the second social institutional reality.

Regarding that high cost, take as just one example the destruction in this State of the child's bonding right:

> [S]ame-sex marriage would require us in both law and culture to deny the double origin of the child. I can hardly imagine a more serious violation. It would require us to change or ignore our basic human rights documents, which announce clearly, and for vitally important reasons, that every child has a birthright to her own two natural parents. It would require us, legally and formally, to withdraw marriage's greatest promise to the child – the promise that, insofar as society can make it possible, I will be loved and raised by the mother and the father who made me. When I say, "Every child deserves a mother and a father," I am saying something that almost everyone in the world has always assumed to be true, and that many people today, I think most people, still believe to be true. But a society that embraces same-sex marriage can no longer collectively embrace this norm and must take specific steps to retract it. One can

believe in same-sex marriage. On can believe that every child deserves a mother and a father. One cannot believe both.[2]

1C. Do these differences raise any statutory, common law or constitutional law issues?

There are certainly no substantial constitutional issues in the perpetuation of the man/woman marriage institution. That is because society (and hence government) has compelling interests in perpetuating the valuable social goods produced in large measure and even uniquely by the now-institutionalized man/woman meaning. The reality of those compelling interests means that, under even the strictest standard of constitutional review, the laws sustaining the man/woman marriage institution fully withstand any and all constitutional challenges leveled at them. Moreover, those laws withstand any and all challenges premised on notions of "over-inclusive" and "under-inclusive." That is because society, if it is to have a normative marriage institution, has *only* two choices: either it will choose genderless marriage or it will choose man/woman marriage. To choose genderless marriage is to cause the loss of the man/woman meaning and therefore the loss of its valuable social goods. Man/woman marriage is neither over-inclusive nor under-inclusive because, to sustain society's compelling interests in the perpetuation of the man/woman meaning's social goods, it *must be only what it is* — the source of institutional power to that meaning.

The judiciary relative to common law issues and the legislature relative to statutory issues can address any actual difficulty arising from Vermont's still relatively new civil-union regime – and do so in an orderly manner based on a solid factual record. Certainly neither the judiciary nor the legislature would be justified in de-institutionalizing man/woman marriage in this State and replacing it with a genderless marriage regime. What is set forth earlier makes that clear.

2. Which states, if any, officially recognize a Vermont civil union? Is the recognition statutory or judicial? Is the recognition full or partial, or circumstance-driven? Same questions about the federal government. Are there any differences compared to recognition of a same-sex marriage from Massachusetts or Canada?

As noted above, there is no federal recognition of Vermont civil unions, nor will there be any federal recognition of a Vermont "marriage" by a same-sex couple, nor does Vermont have any power to alter that important federal policy.

[2] DAVID BLANKENHORN, THE FUTURE OF MARRIAGE 201 (2007).

The chart attached as Appendix 1 answers for each of the fifty states this cluster of questions. Suffice it to say here that no State statutorily authorizes recognition of an out-of-state, same-sex-couple marriage, whether solemnized in Massachusetts or outside the United States, and no state appellate court has yet granted such recognition either. (This is true even in Massachusetts!)

3. In terms of tangible legal consequences, including recognition by other states or the federal government, what identifiable advantages or disadvantages would a lesbian couple with a Vermont marriage license have that they do not have with a Vermont civil union license?

To be sensible, the answer must be put in two parts, in-state and out-of-state legal consequences. In-state, there will be no differences in tangible legal consequences.

Out-of-state, as the law across the Nation now stands, there will be no meaningful differences. All promises (except one) of new legal advantages to Vermont same-sex couples resulting from a genderless marriage regime here are premised entirely on speculation as to what the federal government and the other 49 states may or may not do at some time in the future. The only non-speculative "advantage" would be provision of "standing" to a same-sex couple married in Vermont to demand in a court outside this State recognition of the "marriage" by that foreign jurisdiction. But as seen in the answer to the very next question, those courts are under no federal obligation to recognize such a Vermont "marriage." If they do so, it is as an act of that foreign jurisdiction's own law and public policy.

4. What decided cases and/or pending litigation (including challenges to state or federal Defense of Marriage Act laws) are there which bear on these questions? What do the reported DOMA cases tend to say?

Whole forests have been cut down to make the paper to print the law journal articles arguing the constitutionality of federal and state DOMAs and the applicability of the federal constitution's full faith and credit clause to a same-sex couple's foreign "marriage." And all for nought. As has been clear to careful scholars since the beginning, and as the recently completed briefing in Rhode Island's *Chambers v. Ormiston* case confirmed, the full faith and credit clause does not require any state to recognize a same-sex couple's "marriage" entered into in another state. If a state elects to recognize for its own purposes such a marriage, it does so as an exercise of its own sovereignty and the operation of its own law.

As to the constitutionality of the federal DOMA, all the cases addressing the issue have held it to be constitutional.[3] Further, the key gay/lesbian rights organizations have assiduously sought to avoid litigation of that issue precisely because of their (correct) assessment that the courts, all the way to the United States Supreme Court, will rule against them.[4] As to the constitutionality of state DOMAs, 20 of the 21 American appellate courts to address the issue have held man/woman marriage to be constitutional, including all nine decided since the *Goodridge* decision was handed down in November 2003. And to the extent that state DOMAs prohibit recognition of a foreign marriage by a same-sex couple, settled full-faith-and-credit jurisprudence clearly allows for such.

5. Why did the Massachusetts court reach a different conclusion than the Vermont court? Were there any significances of these reasons for the Vermont civil union law?

As shown in the 2004 article *Judicial Redefinition of Marriage*, both the Vermont Supreme Court in *Baker* and the Massachusetts Supreme Judicial Court in *Goodridge* used a common pattern of argument to reach the desired results.[5] Also as shown in that and a number of subsequent articles,[6] and as recognized since 2003 by a number of American appellate courts, the judicial performances reflected in those two cases' majority opinions are profoundly flawed. "[T]he majority opinions in the [*Baker* and *Goodridge*] cases do not amount to an adequate judicial treatment of a few material, foreground issues. The courts did an unacceptable job with their performance of the very tasks that lie at the heart of judicial responsibility in virtually every case."[7] In bears noting that the literature remains devoid of any counter to that harsh assessment of those judicial performances.

As to why the Vermont Supreme Court allowed civil unions while the Massachusetts Supreme Judicial Court insisted on a genderless marriage regime, the answer cannot really be found in the "no-separate-but-equal" argument of the latter court in *Opinions of the Justices to the Senate*, the decision announcing the insistence on genderless marriage. That argument is quite patently a willful

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[3] Wilson v. Ake, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005); Smelt v. Orange County, 374 F. Supp. 2d 861, 880 (C. D. Cal. 2005), *dismissed on other grounds*, 447 F.3d 673 (9th Cir. 2006) ; *In re* Kandu, 315 B.R. 123, 137–38 (Bankr. W.D. Wash. 2004).

[4] *See* Monte Neil Stewart, *Eliding in Washington and California*, 42 GONZ. L. REV. 501, 514 n.67 (2007), *available at* http://manwomanmarriage.org/jrm/pdf/Eliding_in_WA_and_CA.pdf.

[5] Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 11 (2004), *available at* http://manwomanmarriage.org/jrm/pdf/jrm.pdf [hereinafter Stewart, *Redefinition*].

[6] *E.g.*, Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL'Y 1 (2006), *available at* http://www.manwomanmarriage.org/jrm/pdf/Duke_Journal_Article.pdf.

[7] Stewart, *Redefinition*, *supra* note 5, at 132.

refusal to acknowledge the social institutional argument for man/woman marriage. The enabling power, in these kinds of cases, of willful blindness has been well demonstrated. As to the judges who have gone that route, their very act of ignoring or otherwise evading the social institutional argument for man/woman marriage enabled their opinions to rather freely conclude that society has no rational basis for perpetuating the man/woman meaning in marriage; that there is no harm, no "downside," in replacing that meaning by force of law with *the union of any two persons*; that child welfare is only promoted by such a radical redefinition of marriage; that nothing but religious doctrine sustains the man/woman "limitation"; and that the struggle for genderless marriage is truly equivalent to the struggle culminating in *Perez* and *Loving*. The willful blindness toward the social institutional argument for man/woman marriage also enabled those opinions to rather freely commit an act of profound injustice—to label more or less explicitly, and certainly falsely, a number of people as hateful, mean-spirited, prejudiced, bigoted, invidiously discriminatory, and filled with animus towards gay men, lesbians, and even the children being raised by same-sex couples. The people so labelled include the citizens and the legislators who voted for the impugned man/woman marriage laws and the judges in these and other cases who upheld such laws against constitutional challenge. That injustice certainly merits the harsh but just charge against such opinions of wilful blindness—and all that charge entails with respect to performance of the judicial role.

In the end, this simple answer is the most valid answer to the question of why the Vermont court allowed civil unions while the Massachusetts court insisted on a genderless marriage regime: four of the seven justices on the latter court were simply more wilful than their colleagues in imposing their personal views of the "good society."

6. As posed by the charge to the Commission, what is "the basis for Vermont's separate legal structures for recognizing and protecting same-sex couples versus heterosexual couples?"

The basis for Vermont's simultaneous perpetuation of the man/woman marriage institution and provision of civil unions – what in the California litigation is called the "parallel institutions approach" – is found in the social institutional realities already summarized. Thus, Vermont can have the man/woman marriage institution or it can have a genderless marriage regime or it can have no normative marriage institution at all. Those are the only three choices, and this State can choose only one because two-at-a-time or three-at-a-time are impossibilities. Vermont has always chosen the man/woman marriage institution and legislatively reaffirmed that choice as recently as 2000. For this State to choose a genderless marriage regime is to de-institutionalize the man/woman meaning at the core of the present vital marriage institution; the law is without question sufficiently powerful to accomplish that result. But to de-institutionalize the man/woman

meaning is to lose, sooner rather than later, the valuable social goods produced by that widely shared public meaning. Those valuable social goods include effective protection of the right of a child to know and be brought up by his or her biological parents (with exceptions justified only in the best interests of the child, not those of any adult); optimal provision of private welfare to children conceived by passionate man/woman sex; an effective way over the male-female divide; and the source of the identity and status of *husband* and *wife*. If *the union of a man and a woman* ceases to be a core constitutive meaning of marriage, that institution will cease to provide these particular social goods (and others not listed here but described earlier). And if that meaning is replaced by *the union of any two persons*, a number of those social goods, regardless of their source, will become, quite simply, contrary to official public policy. One is the child's bonding right. Another is the status of *husband* and *wife*.

These social institutional realities lead a number of different modes of critical morality to the same conclusion: critical morality undergirds and sustains both the decision to perpetuate the man/woman marriage institution and the unavoidably concomitant refusal to implement a genderless marriage regime.[8]

This last point leads to these important observations about the basis for Vermont's simultaneous perpetuation of man/woman marriage and provision of civil unions, with that basis being, of course, the social institutional argument for man/woman marriage:

1. Each building block in the argument is uncontroversial. Virtually all serious students of social institutions accept the validity of the understandings comprising it.
2. To date, the argument remains unrefuted. The appellate courts that have mandated genderless marriage (in Massachusetts and Canada), in order to reach that result, ignored or otherwise evaded the argument, and these courts' elision of the argument is now well demonstrated in the scholarly literature. In contrast, the courts that have engaged the argument have rejected genderless marriage. Likewise, none of the serious legal scholars supporting genderless marriage have genuinely engaged and countered the argument.
3. The argument fully qualifies as Rawlsian "public reason" and satisfies even this high standard: "The requirements of public reason would . . . require the delineation of precisely how same-sex marriages threaten the institution of marriage in terms of public reasons and political values implicit in our

[8] Monte Neil Stewart, *Marriage Facts and Critical Morality* 98-112, *available at* http://marriagelawfoundation.org/mlf/publications/Facts.pdf.

public culture."[9] This achievement of the social institutional argument merits emphasis exactly because of what Margaret Somerville has accurately observed:

> One strategy used by same-sex marriage advocates is to label all people who oppose same-sex marriage as doing so for religious or moral reasons in order to dismiss them and their arguments as irrelevant to public policy. [Further,] good secular reasons to oppose same-sex marriage are re-characterized as religious or as based on personal morality and, therefore, as not applicable at a societal level.[10]

4. Because the argument demonstrates that adoption of genderless marriage will necessarily de-institutionalize man/woman marriage, and thereby cause the loss of its unique social goods, the argument effectively refutes the notion that the proponents of man/woman marriage have only one "real" motive: animus towards gay men and lesbians.
5. Because the argument demonstrates society's (and hence the government's) compelling interests in preserving the vital social institution of man/woman marriage, the argument is a sufficient response to all constitutional and public-policy challenges leveled at the laws sustaining that institution.

Respectfully submitted,

Monte Neil Stewart
President
Marriage Law Foundation

October 29, 2007

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[9] Linda C. McClain, *Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage*, 66 FORDHAM L. REV. 1241, 1251 (1998).

[10] Margaret Somerville, *What About the Children?*, *in* DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA'S NEW SOCIAL EXPERIMENT 70-71 (Daniel Cere & Douglas Farrow eds. 2005). She goes on to note that these tactics "do not serve the best interests of either individuals or society in this debate." *Id*. at 71.

STATEMENT

OF

MICHAEL MELLO*
PROFESSOR OF LAW
VERMONT LAW SCHOOL

BEFORE

THE COMMISSION ON FAMILY RECOGNITION AND PROTECTION

October 29, 2007
Vermont Law School
South Royalton, Vermont

 B.A., 1979, Mary Washington College; J.D., 1982, University of Virginia School of Law. My institutional affiliation is noted for identification purposes only; this statement does not speak for Vermont Law School or for any other member of the VLS community.

I am deeply grateful to my research assistant, Shayla Crenshaw, for invaluable help on this statement, and to Laura Gillen for wordprocessing this statement

This statement is an outgrowth of my 2004 book, MICHAEL MELLO, LEGALIZING GAY MARRIAGE (2004), which in turn was an outgrowth of my 2000 article, Michael Mello, *For Today, I'm Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 VT. L. REV. 149 (2000), which in turn was an outgrowth of panel discussions in which I participated on February 8, 2000, and March 5, 2000.

This statement is dedicated, with admiration and affection, to the Crenshaw family of Selma, Alabama: Shayla Crenshaw (VLS '09) and her parents, Counselwoman Bennie R. Crenshaw and Danny W. Crenshaw, Esq. *See* Attachment 1.

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A. GIVE CIVIL UNIONS A RESPECTFUL BURIAL

> [M]ost Negroes are fighting against the system of segregation rather than for the immediate opportunity to have their own children educated in integrated institutions. They do not want to go to "white" schools so much as they want to avoid being forced to attend "colored" schools. As one elderly Negro phrased it with respect to bus integration: *"The seats at the back are just as good as those at the front. Most Negroes still sit in the back, even though we got the buses integrated. But we didn't fight for seats, we wanted to get rid of those signs."*
>
> J.W. Pealtason (1961)[1]

Chairperson Little, and members of the Commission, thank you for inviting me to visit with you today. I am honored to appear before you, and I'm humbled by the presence of two scholars I respect tremendously, Professors Greg Johnson and Monte Stewart.[2] Greg Johnson is Vermont Law School's most serious and productive scholar on civil unions and gay marriage[3], and I'm especially pleased that Monte Stewart is here today, because it is so very important for the Commission to hear all sides of these complicated issues. However, as I will suggest in a moment, the real experts on the core question before this Commission – whether the civil union law stamps Vermont same-sex couples with a badge of inferiority, thus resurrecting the discredited old doctrine of *Plessy v. Ferguson* and separate-but-equal – are not we law professors. We are not the experts on whether same sex couples in Vermont *feel* like second-class citizens. The real experts are those couples themselves – and their children.

My overarching thesis today is simple: The time has come to give civil unions a respectful burial.[4] I emphasize both parts of this proposition. The burial must be respectful: recognizing that, in 2000, civil unions were a courageous and pioneering step on the journey

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[1] J.W. PELTASON, 58 LONELY MEN 104 (1961) (emphasis added).

[2] Of the VLS witnesses, Greg Johnson is the only real expert on same-sex unions. My specialty is capital punishment. Peter Teachout's areas of expertise include sexual harassment law and Holocaust denial or, as he prefers to call it, "Holocaust denial." *E.g.*, Peter Teachout, *Making "Holocaust Denial" A Crime*, 30 Vt. L. Rev. 655 (2006) (scare quotes in original).

[3] E.g., Greg Johnson, *Civil Unions, A Reappraisal*, 30 Vt. L. Rev. 896 (2006) [hereinafter, "Johnson, Reappraisal"]

[4] I borrow the phrase from Justice John Marshall Harlan's concurring opinion in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

towards marital equality between same-sex and opposite-sex couples, and recognizing as well that a legislators' vote for civil unions in 2000 was nothing short of heroic. In my 2004 book on legalizing gay marriage, I singled out Thomas Little as an example of a "courageous legislator."[5] I meant it then. I mean it now.

So, the burial of civil unions must be respectful. But it must be a burial. Same-sex *marriage* in Vermont is a idea whose time has come.

In this statement, I will set out why I believe that even the sweeping system of marriage-like benefits created by the Vermont civil unions statute is still insufficient. That statute, for all its comprehensiveness, and for all the good will and courage of those who voted for it, still created a separate and *un*equal system of matrimony. As we all should have learned from the sad history of separate-but-equal in the context of race, legally-mandated "separate" is inherently "unequal" when the law marks the segregated class with a badge of inferiority. Vermont's legal system of civil unions for same-sex couples marks those couples with an unmistakable badge of inferiority. As this commission has already heard from gay and lesbian Vermonters, that badge of inferiority is keenly felt by many who must wear it.[6]

I understand that the format today calls for me to speak for 30 minutes and then for us to engage in 15 minutes of question and answer. I am happy to do it that way; trust me, I can talk about these issues for longer than 30 minutes. But I'm an appellate litigator by training and experience, and, in oral arguments before panels of appellate judges or justices, half-an-hour of uninterrupted oral argument is never a good sign. So please feel free to interrupt me with

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[5] Michael Mello, LEGALIZING GAY MARRIAGE, 173 (2004) [hereinafter "MELLO, MARRIAGE". *See also, e.g.*, DAVID MOATS, CIVIL WARS, 51, 53, 183, 223, 260, 261, 98, 99, 23-25, 150, 151, 152-154, 155-156, 159-160, 164, 184, 186, 187-188, 191, 192, 199-200,203-205, 206-207, 210, 222, 271 (2004).

[6] *E.g.*, Nancy Remsen, *Gay Marriage Supporters Say Civil Unions Fall Short*, Burl. Free Press, Oct. 11, 2007; Daniel Barlow, *Gay Marriage Commission [sic] Begins Public Hearings*, Times Argus, Oct. 12, 2007; Nathan Burgers, *Gay Marriage Forum Held: Locals Speak Out in Support of Idea*, Oct. 18, 2007.

I share Chairperson Little's concern that the commission hear the full bandwidth of views on this contentious topic. *See* Remsen, *supra*. Were the commission to wish it, I would be happy to make the case, at a future time, against replacing civil unions with gay marriage. Such devil's advocacy is a role I take seriously and have played before. *E.g.*, Michael Mello, "Confessions of a 9/12 Liberal: Defending the USA Patriot Act, the Iraq War, and Israel" (unpublished book manuscript Sept. 2007).

questions, the more and harder the better. You already have my written statement.

1. Roadmap

> They were a nurse, a postal worker, a town planner, mothers and fathers, grandparents, gray-haired and college-age, but they shared a conviction: civil unions fall short of delivering to same-sex couples what marriage provides to a man and a woman.
>
> *Burlington Free Press*, describing the testimony at this Commission's hearing on October 10, 2007[7]

a. Why the Vermont Legislature Opted for Civil Unions Rather Than Marriage: The "Political Reality" of Homophobia

The Commission[8] has asked the VLS witnesses to address six questions.[9] I will address

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[7] Nancy Remsen, *Gay Marriage Supporters Say Civil Unions Fall Short*, Burl. Free Press, Oct. 11, 2007.

[8] See generally, e.g., Rep. Gaye Symington, Speaker of the Vermont House of Representatives, July 25, 2007; Daniel Barlow, *Vermont Leaders to Debate Marriage for Gays*, Rutland Herald, July 26, 2007; Editorial, *The Next Step,* Rutland Herald, July 26, 2007; Wilson Ring, AP, *Vermont Panel To Study Gay Marriage: Douglas: No need To Revive Issue*, Valley News, July 26, 2007; David Gram, AP, *Gay Marriage Foes Confident: "Vermont Renewal" Founder Is Vocal*, Valley News, July 27, 2007; Daniel Barlow, *Experts Say Gay Marriage Issue May Cost Democrats*, Rutland Herald, July 27, 2007; Matthew McCormick, *Vermont Returns To Civil Union Debate*, Valley News, July 30, 2007; Brent Curtis, *Critics Say Commission Makeup Lacks Diversity*, Rutland Herald, Aug. 2, 2007; Editorial, *A Debate Renewed*, Valley News, Aug. 3, 2007; Daniel Barlow, *Bak In The Eye Of The Storm: Little Called ON To Weigh Gay Marriage Issue Again*, Rutland Herald, Aug. 5, 2007; Steve Nelson, Sensibilities, *Government Should Stay Out Of Marriage*, Valley News, Aug. 5, 2007; Beth Robinson and Stephan Gable, *Same-Sex Marriage, Round Two: A Debate*, Rutland Herald, Aug. 12, 2007; Editorial, *Performing a Public Service*, Rutland Herald, Aug. 15, 2007; Daniel Barlow, *Vermont Panel Considers Same-Sex Nuptials*, Rutland Herald, Aug. 24, 2007; Daniel Barlow, *Same-Sex Marriage Debate Off To A Low-Key Start*, Rutland Herald, Aug. 26, 2007; Editorial, *A Thoughtful Beginning*, Rutland Herald, Aug. 26, 2007; Editorial, *Muted Opposition*, Rutland Herald, Oct. 12, 2007.

[9] See E-Mail From Michelle Childs to Gregory Johnson, Oct.4, 2007:

> Question for October 29 symposium at Vermont Law School
>
> 1. What are the legal consequences as between marriage and civil union in Vermont? In terms of legal benefits, protections, rights and obligations, what does a marriage license deliver you that a civil union license doesn't? Do these differences raise any statutory, common laws or constitutional law issues?
>
> 2. Which states, if any, officially recognize a Vermont civil union? Is the recognition statutory or judicial? Is the recognition full or partial, or circumstance-driven? Same questions about the federal government. Are there any differences compared to recognition of a same-sex marriage from Massachusetts, or Canada?
>
> 3. In terms of tangible legal consequences, including recognition by other states or the federal government, what identifiable advantages or disadvantages would a lesbian couple with a Vermont marriage license have that they do not have vita a Vermont civil union license?
>
> 4. What decided cases and/or pending litigation (including challenges to state or federal Defense of Marriage Act laws) are there which bear on these questions'? What do the reported DOMA cases tend to say?
>
> 5. Why did the Massachusetts court reach a different conclusion then the Vermont court? Are there

two: (a) what was the basis for Vermont's "separate legal structures"[10] for protecting same-sex couples, and (b) why did the Massachusetts court reach a different conclusion than the Vermont court, and do those reasons have significance for the Vermont civil union law?

This statement will proceed in five parts. First, I will explore the question why the Vermont legislature opted for civil unions, rather than gay marriage, following the court's decision in *Baker v. State*. The reason is depressingly evident from the record: "Political reality" made civil unions the only realistic option for the legislature in 2000.[11]

The backlash to *Baker* was stunning.[12] At least it stunned me.[13] The nativist signs to "Take Back Vermont" seemed to be on every parcel of land I drove by and on the bumpers of every car I passed on the road. There were the polls.[14] Thee were the petitions.[15] There was Town Meeting Day 2000.[16] But, for me, the worst of it was reading my newspapers every morning, especially the letters to the editor.[17] There they were, filled with fear and anger and bigotry, in my Vermont newspapers, every day, day after day.[18] (Those letters to the editor, and the other manifestations of bigotry and fear in Vermont in 2000, were why I wrote the book. I couldn't believe it was happening here, in this place, in this time. I still can't quite believe it.)

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any significances of these reasons for the Vermont civil union law?

6. As posed by the charge to the Commission, what is "the basis for Vermont's separate legal structures for recognizing and protecting same-sex couples versus heterosexual couples?"

[10] *Id*.

[11] MICHAEL MELLO, LEGALIZING GAY MARRIAGE 74-192 (2004) [hereinafter MELLO, MARRIAGE].

[12] *Id*. at 45-141

[13] *Id*. at 193-194

[14] *Id*. at 68-70

[15] *Id*.

[16] *Id*. at 70-72

[17] *Id*. at 49-68

[18] *Id*.

Anyway, *Baker* unleashed an avalanche of homophobia in Vermont. Even civil unions cost a bitter price for legislators voting for it. Gay marriage was perceived to have been not politically possible.

b. The Massachusetts Court Explicitly Rejected Civil Unions, Because "The History Of Our Nation Has Demonstrated That Separate Is Seldom, If Ever, Equal"

Second, I will discuss developments in Massachusetts in 2003 and 2004. As is well known, in 2003, in the *Goodridge* case,[19] Massachusetts' high court ruled that the state constitution demanded same-sex marriage. However, less well-known was what happened next.

The Massachusetts Senate considered a bill creating civil unions but not same-sex marriage. The Senate then asked the Massachusetts high court for an advisory opinion on whether civil unions would suffice to satisfy the requirements of *Goodridge*. The Massachusetts court received briefs from a wide variety of interested parties, including a brief which reads like a who's-who among civil rights organizations:

- UNITED STATES REPRESENTATIVE JOHN LEWIS
- THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION
- THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS
- THE ASIAN-AMERICAN LAWYERS ASSOCIATION OF MASSACHUSETTS
- THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND
- THE BOSTON BAR ASSOCIATION
- COMMUNITY CHANGE, INC.
- THE FAIR HOUSING CENTER OF GREATER BOSTON
- THE GREATER BOSTON CIVIL RIGHTS COALITION
- THE JEWISH ALLIANCE FOR LAW AND SOCIAL ACTION
- JUSTICE RESOURCE INSTITUTE, INC.
- JRI HEALTH; LAMBDA LEGAL DEFENSE AND EDUCATION FUND
- LA RAZA CENTRO LEGAL
- THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF THE BOSTON BAR ASSOCIATION
- LLEGO, THE NATIONAL LATINA/O LESBIAN, GAY, BISEXUAL AND TRANSGENDER ORGANIZATION
- THE MASSACHUSETTS ASSOCIATION OF HISPANIC ATTORNEYS
- THE MASSACHUSETTS BLACK WOMEN ATTORNEYS
- THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL

[19] Goodridge v. Dept. of Health, 798 N.E.2d 941 (Mass. 2003) (*Goodridge I*).

CONSORTIUM
- THE NATIONAL ASSOCIATION OF WOMEN LAWYERS
- THE NATIONAL ASSOCIATION OF SOCIAL WORKERS
- THE NATIONAL ASSOCIATION OF SOCIAL WORKERS MASSACHUSETTS CHAPTER
- TH E NATIONAL CENTER FOR LESBIAN RIGHTS
- THE NATIONAL COUNCIL OF JEWISH WOMEN, INC.
- THE NATIONAL LAWYERS GUILD LESBIAN, GAY, BISEXUAL AND TRANSGENDER COMMITTEE
- THE NATIONAL LAWYERS GUILD MASSACHUSETTS CHAPTER
- THE NATIONAL ORGANIZATION FOR WOMEN
- THE NORTHWEST WOMEN'S LAW CENTER
- NOW LEGAL DEFENSE AND EDUCATION FUND
- PEOPLE FOR THE AMERICAN WAY FOUNDATION
- SOULFORCE, INC.
- THE SOUTHERN POVERTY LAW CENTER
- THE URBAN LEAGUE OF EASTERN MASSACHUSETTS
- THE WOMEN'S BAR ASSOCIATION OF MASSACHUSETTS[20]

The brief asserted forcefully that civil unions resurrected the discredited doctrine of separate but equal.

Vermont lawyers Beth Robinson[21] and Susan Murray – lead counsel in *Baker v. State* – also filed a brief to the Massachusetts high court making a similar separate but equal argument and tracing the history behind Vermont's civil unions statute. Robinson and Murray rejected civil unions as a separate and inherently unequal institution:

> Even if a separate status for same-sex couples could replicate all of the tangible and intangible benefits provided by marriage, which it cannot, such a system would still make second-class citizens of the couples who had no choice but to enter into this separate institution because marriage was forbidden to them. As the United States Supreme Court recognized fifty years ago, "separate but equal" is not equal. Excluding same-sex couples from joining the cherished institution of marriage is intrinsically harmful because it would mark them as inferior to their heterosexual counterparts and diminish their status in the community. Because the exclusion would send the official message that same-sex relationships are not as worthy of respect as heterosexual relationships, those relationships would not be treated with the same respect by others. Giving same-sex couples a separate but purportedly equal system for gaining recognition of their relationships would not change this, and would not constitute equality, because their relationships still would not be recognized by the rest of society as

[20] This brief is appended to this statement. *See* Attachment 2.

[21] *See generally, e.g.*, DAVID MOATS, CIVIL WARS at 1-5, 99-100, 201, 228, 240-241, 250, 18, 21, 224, 228, 248, 14, 104-106, 194, 156, 182, 183-185, 193, 201, 224, 111-113, 130-136, 4, 7, 9, 10-13, 16-18, 136-138, 117-121, 17-18, 34-35, 139, 144 (2004).

being as valued as heterosexual relationships.[22]

The court, in *Goodridge II*, agreed that civil unions constituted a separate regime and noted that "the history of our nation has demonstrated that separate is seldom, if ever, equal."[23]

c. Civil Unions: Separate and Unequal

Third, I will argue that the Massachusetts high court was right. The only thing equal to marriage is marriage. I will also explore exactly *why* the separate but equal doctrine was so wrong. Vermont's third way was a giant step forward for gay rights. In the end, however, I believe that civil unions fail as a separate-but-equal version of same-sex marriage that stamps gay and lesbian couples with an unmistakable badge of inferiority and second-class citizenship.[24] In response to the fierce and widespread public opposition to granting same-sex couples any legal recognition, Vermont resurrected the old doctrine of separate-but-equal, along with the old myth that "separate" can ever be "equal." In *Brown v. Board of Education*, decided a half-century ago, the U.S. Supreme Court held that "separate educational facilities are inherently unequal."[25] This was so because legally mandated segregation stamped the segregated with a badge of inferiority. Similarly, denying committed same-sex couples the right to marry–while at the same time giving them the same bundle of legal rights associated with marriage–stamps those couples with an unmistakable badge of inferiority. Supporters of the civil unions compromise stressed to opponents that civil unions were not *marriage*–the statute itself defines marriage as a union between a man and a woman. Because this demarcation was at the core of the arguments made by the statute's legislative supporters, the new law sends same-sex couples the same message of second-class matrimonial citizenship that the separate-but-equal doctrine sent to racial minorities

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[22] *See* Attachment 2.

[23] Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) (*Goodridge II*).

[24] The phrase *badge of inferiority* is a constitutional term of art; that is, it was a term coined by the courts. The phrase was employed in *Plessy v. Ferguson* in reference to the separate-but-equal status imposed on African Americans.

[25] *Brown v. Board of Education*, 347 US. 483 (1954).

in the six decades before *Brown v. Board of Education*.

d. Why Not Marriage Now?

Fourth, I will answer some of the arguments against gay marriage. Sexual identity is not a "choice." Gay marriage will not undermine heterosexual marriage.

e. Please Prove My Prediction Wrong: Be a Pioneer Again (And Resist the Calls to "Take It To The People" By Public Referendum)

Fifth, this statement will ask you to prove me wrong on one point.

In my gay marriage book, I predicted that the Vermont legislature would not, for a long time and perhaps ever, take the final step to same-sex marriage.[26] I very much hope the Vermont legislature will prove me wrong.

I must confess to some unease about having the Vermont legislature—or any legislature—be the arbiter of the basic civil and human rights of despised minorities. Legislators respond to the people who elected them. In 2000, it became clear that many, many Vermonters feared and loathed gay people. The homophobia of 2000 wasn't just directed at gay marriage or civil unions. It was directed at gay and lesbian people themselves. Many Vermonters didn't just hate civil unions. They hated gay people.

Some have urged the legislature to hold a popular referendum on the issue of same-sex marriage.[27] This would be a reamarkably bad idea. Even a non-binding referendum would

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[26] M ELLO, MARRIAGE, *supra*, at 185-192.

[27] *E.g.* Letter to the Editor, Rutland Herald, Oct. 24, 2007:

Let people vote on marriage

Same-sex marriage—a very interesting term to camouflage or distort society's definition of the term "marriage." Marriage, a term used by most societies of the world, past and present, is used to define a fact of nature and the natural laws of mankind for procreation, the development of the family and society itself. This new legislation is an attempt to distort the union of husband and wife, man and woman, and the natural family unit.

If two women or two men wish to cohabitate together, that is their prerogative, but they should not try to force their demands on society. If their rights are hindered, they can seek separate laws, but not make believe they have a natural family right.

When the Vermont Legislature railroaded the passage of the civil union bill, they overrode the will of the Vermont citizens, who voted against this legislation in town meetings across the state.

If we are to have a same-sex marriage law in Vermont, it should come about after a binding statewide vote on Town Meeting Day. Let all the people speak.

Eugene Poplawski
Rutland

violate the Vermont constitution. My memory is that in 2000 bigots and homophobes, acting on bad legal advice from scholarly opponents of same-sex marriage, demanded a popular referendum on the issue of marriage. Lawyers with knowledge of the state constitution—and lacking an agenda to narrow the marital rights of gay couples as much as plausible—concluded that the Vermont constitution did not authorize such referenda. Vermont is not a referendum state. That a number of (probably unconstitutional) referenda had been held in the past, the most recent being some three decades ago, was beside the point.

There is an even more fundamental structural reason against putting same-sex marriage to referendum. We don't entrust the basic rights of despised minorities to popular vote or to politicians for a reason. That's what courts are for. What if *Brown v. Board of Education* had been put to a popular referendum in the south or left to southern legislatures, in 1954. Or 1964. Or 1974. Or 1984. It's useful to remember that Jim Crow statutes were enacted by *legislatures* and signed into law by governors. It took *court* decisions to end Jim Crow.

Having said all that, if any legislature in America could enact gay marriage in 2007 it would be Vermont's legislature.

In 2000 Vermont was a pioneer in enacting civil unions, albeit under pressure from the Vermont Supreme Court. The rest of the nation and world watched events here closely in 2000. Other states followed Vermont's lead. In 2005 the Connecticut legislature enacted civil unions. A New Hampshire civil union statute goes into effect in January 2008.

For the Vermont legislature to enact marriage—on its own, not at the barrel of a judicial gun—would be an event of symbolic and practical significance. Enacting same-sex marriage would be symbolic because it would place Vermont, again, at the leading edge of marital equality for same-sex couples. The nation would pay attention.[28] The world would pay attention.

Enacting same-sex marriage would be significant legally and practically because of a

[28] Vermont's civil unions law has inspired two excellent books. *See* DAVID MOATES, CIVIL WARS (2004); WILLIAM ESKRIDGE, EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2002). *See also* MELLO, MARRIAGE, *supra*.

quirk in Massachusetts law. Gay marriage in Massachusetts is limited to in-state residents.[29] By contrast, Vermont civil unions—and presumably marriage as well—would be open to out-of-state couples.

For the portability of gay marriage to be tested in courts, and ultimately in the U.S. Supreme Court, gay couples who marry in one state must move in another state. A Vermont marriage statute open to all Americans would make this more likely to occur. The advocacy group Gay and Lesbian Advocates and Defenders (GLAD) explained:

> Civil unions currently only exist in Vermont and Connecticut (California has a Domestic Partnership Registry that provides nearly all the state benefits accorded to married couples, to which similar and likely greater limitations apply). Vermont and Connecticut civil unions convey all state and no federal benefits, but the term has no fixed definition – a state legislature could call any group of limited protections "civil unions." DOMA, a 1996 anti-gay federal law, denies federal recognition to any same-sex union in the short term, including all federal benefits. However, *with equal marriage for same-sex couples, this federal law can be challenged legislatively or through the courts. With civil unions, no challenge is possible.*[30]

In a way, however, the acceptance of a Vermont same-sex marriage law ought not factor into your calculus. The Vermont legislature doesn't have the power to set national policy on gay marriage (I say that with more than a little sadness). You don't have the jurisdiction to command marital equality for all the United States and for the federal government.

But the Vermont legislature *does* have the jurisdiction to mandate full marital equality in Vermont. That is a lot, and that is enough. Perhaps a same-sex marriage statute in Vermont would be recognized by some other states and by federal law, and perhaps a Vermont law would set the stage for the U.S. Supreme Court to recognize a federal constitutional right to full marital equality. Perhaps a Vermont statute would only provide equality for Vermont couples.

Somebody has to be first. It might as well be us. Again.

If the legislature fails to enact marriage, I think it's likely that the constitutionality of civil

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[29] Greg Johnson, *Civil Unions, A Reappraisal*, 30 Vt. L. Rev. 896 (2006).

[30] *See* Attachment 5.

unions will end up in the Vermont Supreme Court.[31] As Beth Robinson and Susan Murray argued in their *Goodridge II* brief, the Vermont Supreme Court has never been asked to decide whether the civil unions statute violates the rights recognized in *Baker*. After the civil unions statute was enacted, the lawyers for the *Baker* couples moved to dismiss the lawsuit. The arguments made by Robinson and Murray in their *Goodridge II* brief – and made by me in my book – have never been made to the Vermont Supreme Court. Yet.

Vermont was a pioneer in 2000. Please be a pioneer again. Please prove my prediction wrong.

2. Professors Eskridge and Johnson: Civil Unions Don't Resurrect Separate-but-Equal

> Separate is never equal
>
> Eric McCann, of North Troy, testifying before this Commission (October 10, 2007)[32]

However, before rolling into my arguments, I want to pause to express my uneasiness about making them. Leaders of the Vermont gay and lesbian community strongly supported the civil unions law in 2000. The lead lawyers for the *Baker* plaintiffs pushed hard for civil unions in 2000.

a. Jim Crow Doesn't Equal Civil Unions

Two of the most courageous and thoughtful gay rights scholars disagree with virtually all I am about to assert. Yale Law School Professor William Eskridge, in his brilliant book, *Equality Practice: Civil Unions and the Future of Gay Rights*, demonstrated the civil unions law does not assure full equality with marriage: Civil unions are unequal in status, unequal in their

[31] And prevail there. *See* MELLO, MARRIAGE, *supra,* at 185-190 and n 191.

[32] Nathan Burgess, *Gay Marriage Forum Held*, County Courier, Oct. 18, 2007 (quoting Eric McCann). *See* Attachment 4.

interstate portability, and unequal as regards benefits and obligations afforded by federal law.[33] Still, Eskridge rejected the notion that *Baker* and civil unions resurrect the separate-but-equal doctrine of *Plessy v. Ferguson*: "I am a classic liberal and a gay person who supports legal recognition of same-sex marriage. My last book criticized the twentieth-century legal regime that created an 'apartheid of the closet' . . . Yet I do not believe the civil unions law creates an apartheid. . . . Nor do I believe the analogy to *Plessy* holds up. Formally, the law neither separates citizens nor equalizes their entitlements. Functionally, the law ameliorates rather than ratifies a sexuality caste system. The racial apartheid adopted by southern state legislatures and upheld in *Plessy* was very different from the new institution suggested in *Baker* and adopted by the Vermont legislature. Similarly, it is greatly unfair to tag the civil unions measure as 'separate-but-equal'."[34]

Professor Eskridge supports civil unions as a step on the road to full marital equality. Vermont Law School Professor Greg Johnson[35] goes even further: "Was it a mistake to support civil unions? I don't think so, because it gave same-sex couples rights they badly needed. But on top of that, what is wrong with being different? The presumption behind Mello's position may be that no lesbian or gay couple could possibly want something other than what heterosexual couples have, that marriage is the pinnacle, the summit, the only form of state recognition worth pursuing—the key to equality and happiness. I would hope that the struggle for same-sex marriage is about more than imitation and emulation. Civil unions give the lesbian and gay community a chance to be different, a chance to celebrate its identity . . . *viva la difference*."[36]

b. Intentional Discrimination Versus Discriminatory Effects

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[33] WILLIAM ESKRIDGE, EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 133-39 (2002) [hereinafter ESKRIDGE, CIVIL UNIONS].

[34] *Id.* at 139-140.

[35] Greg Johnson, *Civil Unions, a Reappraisal*, 30 Vt. Law Rev. 891 (2006) [hereinafter "Johnson, *Reappraisal*"].

[36] Greg Johnson, *Vermont Civil Unions: A Success Story*, in MARRIAGE AND SAME-SEX UNIONS: A DEBATE 291-92 (Lynn Wardle, et al, eds. 2003).

I agree with Professors Johnson and Eskridge that *Baker* and civil unions were great leaps forward for same-sex couples. I also agree that voting for civil unions in 2000 required great courage. No one who lived in Vermont in 2000, as Johnson did, or who interviewed the legislative leaders, as Eskridge did, could fail to marvel at the guts of people like Thomas Little. I am extremely reticent to conclude that these acts of courage resulted in nothing more than a separate-but-equal marriage lite. Still, in the end, that is my reluctant conclusion.

Professors Johnson and Eskridge are right about one difference between racial apartheid under *Plessy* and civil unions in Vermont. Jim Crow laws were largely *intended* to stamp African Americans with a badge of inferiority. The segregation systems under *Plessy* were *intended* to mark African Americans with a badge of inferiority. Segregation was an aspect of white supremacy throughout the south of my youth.

Civil unions were not largely *intended* to stamp same-sex couples with such a badge of inferiority. To the contrary, civil unions were largely *intended* to provide as much marital equality as was politically possible and realistic in 2000. This distinction – that racial segregation was *intended* to communicate a message of second-class citizenship, while civil unions were *intended* to send the opposite message – is at the heart of Professors Eskridge and Johnson's defenses of civil unions.

However, as the civil rights briefs filed in *Goodridge II* demonstrate, the *effect* of civil unions is to mark same-sex couples with a badge of inferiority, regardless of the good intentions of the supporters of the statute in 2000.

c. The Real Experts On Whether Civil Unions Feel Discriminatory: Same-Sex Couples and Their Children

> The phrase that came to [attorney Beth] Robinson's mind was *separate but equal*, the legal justification used for decades to legitimize school segregation.
>
> David Moats, describing Beth Robinson's reaction the

day *Baker v. State* was decided.[37]

i. Vermont Same-Sex Couples Bear Witness

On this pivotal question – what are the *effects* of the *law's* distinction between civil unions and gay marriage – the real experts are not we law professors. The real experts are the average same-sex couples in Vermont and beyond. I know you have heard from some of them already. I hope you will hear from more of them, from a lot more of them, from as many of them as possible. Same-sex couples are the real experts on whether civil unions make *them feel* like second-class citizens on the matrimonial bus. I hope you will listen to them.

And to their children. As a way of framing the issue presented, consider a question asked by a hypothetical child of a Vermont couple joined by civil union. Our hypothetical child asks her mommies: "Why aren't you married, like parents of my friends at school are married?" A candid answer would be troubling. Such as an answer would have to include the fact that the civil unions statute explicitly forbids same-sex marriage. And that the reason for the law's exclusion – the *only* reason for the law's exclusion – was the "political reality" of homophobia in Vermont.

I believe Professor Greg Johnson when he says that civil unions don't make *him* feel like a second-class citizen. I am honestly happy that civil unions don't make him feel diminished in any way. He's one of my favorite faculty colleagues, and I consider him a cherished friend.

But the Commission has already heard that many same-sex couples in Vermont *do* feel relegated to second-class matrimonial citizenship by civil unions. Media reports suggest that this Commission has already heard testimony that civil unions make many Vermont couples *feel* like second-class citizens.[38] They are the *real* experts.

The reality is that some same-sex couples in Vermont are perfectly content with civil

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[37] Moates, *supra*, at 16 (emphasis in original).

[38] *E.g.,* Nancy Remsen*, Gay Marriage Supporters Say Civil Unions Fall Short,* Burl. Free Press, Oct. 11, 2007; Daniel Barlow, *Gay Marriage Commission [sic] Begins Public Hearings,* Times Argus, Oct. 12, 2007; Nathan Burgers, *Gay Marriage Forum Held; Locals Speak Out in Support of Idea,* Oct. 18, 2007.

unions. Some gay and lesbian Vermonters who—like Professor Johnson—are trained in the law and in the history of the same-sex unions controversy in Vermont do feel that civil unions are better than marriage. Others feel that only marriage is equal to marriage. Adults, gay or straight, can understand the counterintuitive notion that separate can be truly be equal.

My concern is for the *children* of same-sex couples in Vermont. Children don't think like law professors. Children don't think like lawyers. Children don't appreciate the nuances of history or culture or "*political reality."*

The civil rights briefs filed in *Goodridge II* demonstrate that the *effect* of civil unions is to mark same-sex couples with a badge of inferiority, regardless of the good intentions of the supporters of the statute in 2000. I think they make a compelling case.

ii. Bearing Witness to Jim Crow in Selma, Alabama: The Crenshaw Family Memos

I suggested above that the real experts on whether civil unions make same-sex couples *feel* like second-class citizens are the couples themselves. Likewise, the real experts on the impact of the separate-but-equal on the souls and psyches of its victims are not law professors in the region of America Stephen Carter deliciously called "the heart of whiteness."[39] Vermont is the second whitest state in the union. It always seems surreal for me to talk about race here.

The real experts on separate-but-equal in the Jim Crow south are the African Americans who endured it and their children.[40] Attachment One to this statement contains precisely this sort of witness.[41] The Crenshaw family describes what it felt like to be African American in Selma, Alabama, during Jim Crow and today.[42] If you read none other of the attachments to this

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[39] STEPHEN CARTER, NEW ENGLAND WHITE (2007).

[40] *See* Attachment 1.

[41] *Id*.

[42] *Id*.

statement, please read the Crenshaw family memos.[43]

d. I May Be Wrong

At the end of the day, Professor Johnson might be correct that civil unions only make same-sex couples feel different and special, not inferior. In a way, I hope he's right.

Who am I, a happily-married heterosexual, to disagree with gay men and scholars like Johnson and Eskridge? That's a question I've been asking myself for years now. My answer is that scholars have a duty to ask uncomfortable questions out loud.[44] Thus, I will argue that civil unions are problematic. My aim here is not to make a brief for same-sex marriage. That has been done excellently by William Eskridge,[45] Barbara Cox, and others.

B. WHY THE VERMONT LEGISLATURE ADOPTED CIVIL UNIONS RATHER THAN GAY MARRIAGE: THE "POLITICAL REALITY" OF HOMOPHOBIA

> I was told by a fairly conservative member of the [House Judiciary] Committee that, if this were not an election year, the vote would have been 11-0 for *marriage*.
>
> Sen. Ben Ptashnick[46]

The charge to this Commission posed a question: What "is the basis for Vermont's separate legal structures for recognizing and protecting same-sex couples versus heterosexual couples?" The answer to this question is simple and depressing: "political reality" or, to put it bluntly, homophobia. The history culminating with the civil unions statute makes this clear.

I don't want to minimize the importance of the civil unions law.[47] It was a giant step forward for gay and lesbian couples.[48] However, as comprehensive as the parallel system is, it

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[43] *Id*.

[44] Michael Mello, *Dead Reckoning: The Duty of Scholarship*, 35 CRIM. L. BULL. 478 (Sept./Oct. 1999).

[45] *E.g.*, WILLIAM ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE (1996).

[46] Leslie Staudinger, *VLS Community Participates In Same-Sex Marriage Debate*, Loquitur (spring 2000) (emphasis added). Senator Ptashnick made this statement at a panel discussion at Vermont Law School on February 8, 2000.

[47] MELLO, MARRIAGE, *supra*, at 191.

[48] *Id.*

remains a separate-but-equal substitute for marriage.[49] And the reason for the separateness—the *only* reason for the separateness—was the strong public sentiment against the recognition of same-sex marriage.[50] The post-*Baker* legislative activity[51] suggests that Justice Johnson was prescient in her warning that the *Baker* majority had left the plaintiffs "to an uncertain fate" in the "political cauldron"[52] of the legislature.

1. Legal Advice From the Professors: Teachout and Kujovich

> The civil union law created second class citizens in Vermont. I believe my 32 year commitment to my partner should carry the same meaning as marriage.
>
> Michael Saint-Joseph, of Enosburg, testifying before this Commission (Oct. 10, 2007)[53]

The *Baker* decision recognized a constitutional right but gave the legislature first crack at creating a remedy. The court suggested that the legislature could either extend the right of civil marriage to same-sex couples or create a comprehensive system of "domestic partnerships" – later captured in the phrase "civil unions" – that would be the functional equivalent of marriage but which wouldn't use the "m" word. The court retained jurisdiction in the case.

The House Judiciary Committee held a series of hearings in January 2000 at which experts in various fields testified—including clerics, some of whom testified against homosexuality—about their views on *Baker* and how the legislature should respond to *Baker*. The first witnesses addressed how the *Baker* decision ought to be interpreted.

The two lead lawyers on *Baker* testified that the legislature should simply open up the marriage laws to include same-sex couples. Susan Murray and Beth Robinson "told the

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[49] *Id.*at 74-141

[50] *Id.* at 45-192

[51] *Id.* at 45-192

[52] *Baker*, *supra*.

[53] Nathan Burgess, *Gay Marriage Forum Held*, County Courier (Oct. 18, 2007) (quoting Michael Saint-Joseph).

committee that gay and lesbian couples still would be denied some important tangible benefits if the legislature stopped short of allowing them to marry and instead created domestic partnerships."[54]

"Robinson and Murray both spoke passionately when they described some of the tangible benefits that are denied gays and lesbians. But they were most forceful in talking about the intangible benefits that same-sex couples would not get if the legislature followed the domestic partnership option. Being denied the right to marry, Murray said, gives gays and lesbians the feeling they are inferior. "There's a message they get that they're second-class citizens."[55]

"There's an erosion of the spirit," Murray said.[56] This loss was best illustrated, Murray testified later, when she "asked the committee to imagine the reaction if people who were now married were given the status of domestic partners. 'There would be an uproar,' she said. 'Those husbands and wives would feel they'd lost something.'"[57] Robinson added, "The word [marriage] itself is something. Everybody knows what it means. It's a powerful term."[58]

Beth Robinson "compared the current opposition to same-sex marriage to earlier prohibitions against interracial marriages."[59] "Robinson also told the committee that when states finally recognized that they were discriminating against mixed race couples, no one suggested that an alternative relationship be created for them that would provide equal benefits but still not allow them to marry."[60]

Witnesses also told the committee that the *Baker* court "left open the question of whether

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[54] Jack Hoffman, *Panel Tackles Marriage Issue*, Rutland Herald, Jan. 12, 2000.

[55] *Id*. (quoting Susan Murray).

[56] *Id*. (quoting Susan Murray).

[57] *Id.* (quoting Susan Murray).

[58] *Id.* (quoting Beth Robinson) (parenthetical in original).

[59] *Id*.

[60] *Id*. (quoting Beth Robinson).

same-sex couples could be adequately protected through domestic partnerships or whether marriage would have to be the ultimate solution. The witnesses pointed out that the court said it was leaving that question to another day. In part, the answer to that question would depend on what alternative the legislature devises if it chooses not to approve same-sex marriage."[61]

a. Teachout: How To Minimize *Baker's* Mandate of Marital Equality

VLS Professors Peter Teachout and Gil Kujovich testified before the House Judiciary Committee in 2000. Between the two of them, Teachout and Kujovich gave the legislature the intellectual and legalistic bases for taking a minimalist view of the rights *Baker* extended to same-sex couples. The professors also gave the legislature political cover for narrowing the reach of *Baker* as far as possible without defying the court outright. Whether or not Teachout or Kujovich intended to create the intellectual architecture for limiting *Baker*'s rights, that was the effect of their testimony in 2000.

Professor Peter Teachout disagreed with Beth Robinson and Susan Murray that *Baker* required marriage: Domestic partnership would do. Teachout explained how the legislature could adopt a minimalist view of *Baker* that would still pass constitutional muster.[62] Veteran Vermont reporter Jack Hoffman described Teachout's testimony:

> Peter Teachout, a professor at Vermont Law School who specializes in constitutional law, said he believed the court had clearly left open the possibility that an alternative system could meet the test.
>
> Teachout pointed out that there had been a sharp disagreement on the court over that very issue. Associate Justice Denise Johnson argued strongly in a dissenting opinion that the court should have ruled that the three couples should be granted marriage licenses. However, the four other justices joined with the majority decision that said the

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[61] *Id*.

[62] The Beth Robinson and Susan Murray *amicus* brief in *Goodridge II* noted:

> Vermont Law School Professor Peter Teachout, who opined that the Vermont Supreme Court had left the door open to a separate status, acknowledged that domestic partnerships would not provide all the same benefits of marriage, including portability and intangible benefits. Professor Teachout explained that a domestic partnership option could remove much of the discrimination against same-sex couples.. What the Vermont Supreme Court would have to decide .¯gin the *future,* if domestic partnerships were approved., is whether there were adequate reasons to justify the benefits that would still be denied to same-sex couples. *See* Jack Hoffman, *Panel Tackles Marriage Issue*, Rutland Daily Herald, Jan. 12, 2000, at 1

legislature could amend existing law or create an alternative system, such as domestic partnerships.

There was an argument among the justices over domestic partnerships, Teachout said, so it was clearly considered by the court.

Teachout agreed with Robinson and Murray that domestic partnerships would not provide all the same benefits of marriage. One thing same-sex couples wouldn't get, he said, "was the gateway to other states."

Teachout also talked about the intangible benefits.

"The other thing you don't get is that bestowal of legitimacy," he said.

Teachout then explained that the legal question for the sate and the legislature, if it followed the domestic partnership option, was whether it could justify treating same-sex couples somewhat differently than heterosexual couples.

By providing the legal benefits and protections, Teachout said, the state could remove much of the discrimination against same-sex couples. What the Supreme Court would have to decide in the future, if domestic partnerships were approved, is whether there were adequate reasons to justify the benefits that would still be denied to same-sex couples.[63]

Teachout, in his testimony in the Vermont legislature

offered some arguments the state might make if the legislature approved domestic partnerships and that new system were challenged in court.

Tradition was one, he said. Because marriage had traditionally been a union of one man and one woman, the state could argue that the parallel arrangement was justified as long as domestic partners had almost all of the same benefits.

Teachout also said that if Vermont became the only state to allow same-sex marriage, it could attract gay and lesbian couples who wanted to marry—and might later want to divorce. If it appeared that would place an added burden on the Vermont courts and other state institutions, that could be another justification for creating domestic partnerships instead, according to Teachout.[64]

I thought my colleague was wrong on all counts.[65] First, the claim that same-sex marriage undermined traditional marriage was a thinly-disguised critique of homosexuality itself: Same sex marriage could only destabilize heterosexual marriage if it is inherently so evil or immoral that its very *existence* undermines heterosexual marriage.[66]

Teachout's contention that marriage has always excluded gays is no more persuasive than the contention that the law long discriminated against African Americans in general and

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[63] *Id*. (quoting Peter Teachout)

[64] *Id*.

[65] M ELLO, MARRIAGE, *supra*.

[66] *Id*.

interracial marriage in particular. The law did indeed discriminate for a very long time. But that fact damns the law. It doesn't justify the discrimination.

Teachout's "hordes of homosexuals" rationale for the legality of a separate-but-equal marriage substitute—that allowing same-sex marriage would draw hordes of homosexuals to Vermont, swamping our courts with their unions and divorces—was equally unpersuasive.[67] I doubted that many gays would migrate to Vermont and stay, for the same reasons relatively few heterosexuals do so: The winters are brutal and last nine months; good jobs are scarce, and they don't pay well; good housing and schools are difficult to find. Actually, the homosexual hordes argument supports allowing them to *marry*. If they can marry here, then that marriage might well prove portable: They can take it home with them. By contrast, civil unions may or may not be portable: If they get one here, it's only good here, so they'll be more likely to stay here.

b. Kujovich: Go Slow

The Judiciary Committee also heard from Vermont Law School Professor Gil Kujovich, an expert on constitutional law. Senator Vincent Illuzzi pressed Kujovich on whether he supported the *Baker* decision.[68] "Kujovich responded that it was within a reasonable legal interpretation of the Common Benefits Clause [of the Vermont constitution]. Senator Illuzzi came back with, 'do you, or do you not, support the *Baker* decision?' Kujovich firmly stated, 'I do not have a position.'"[69]

Professor Kujovich praised the Vermont Supreme Court for moving slow on same-sex marriage.[70] I am troubled when heterosexuals argue that gays and lesbians ought to settle for less than the full equality enjoyed by we heteros. I am troubled for the same reason I distrusted

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[67] *Id.*

[68] Bev Marker, *Professor Kujovich Speaks to the Vermont Judiciary Committee*, FORUM [the student newspaper of Vermont Law School]), April 7, 2000.

[69] *Id*. (quoting Sen Vincent Illuzzi and Prof. Gil Kujovich).

[70] Gil Kujovich, *An Essay On The Passive Virtues Of Baker v. State*, 25 Vt. L. Rev 93 (2000).

whites in the south of my youth who argued that African Americans ought to wait. It's easy to exhort others to wait for the full rights of citizenship you have always enjoyed. In thinking about *Baker* and the legislative response to *Baker*, it is well for us to remember the words of Thurgood Marshall about the "personal and present"[71] rights of the African Americans in *Brown* not to be discriminated against.

Kujovich also warned the Senators that any legal differences between civil unions and marriages would render the former vulnerable to constitutional challenge. Such vulnerability would be increased if the differences between unions and marriages were motivated by animus toward homosexuals.[72] He counseled that the legislation would be safer if justified by the protection of traditional marriage, rather than by hostility toward same-sex couples.[73] Kujovich thus advised the legislature to use the right magic words – to call civil unions a matter of "traditional marriage," not hostility to same-sex couples.

Thus did Professors Teachout and Kujovich provide the House Judiciary Committee with an intellectual roadmap for taking the narrowest plausible view of the equality rights recognized in *Baker*. No VLS professors testified that *Baker* required marriage, because anything less would be a separate and inherently unequal *legal* system of matrimony.

That academics would urge gay and lesbian couples to go slow on same-sex marriage ought to surprise no one. The same thing happened in Virginia and throughout the south after *Brown v. Board of Education*. The ink on *Brown* was still wet when prominent law professors – at my alma mater, the University of Virginia School of Law, and elsewhere – began offering Jim Crow legislators and governors advice on taking the narrowest view possible of the scope of the

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[71] A RGUMENT 439 (Chelsea House Publishers 1969).

[72] *Id.*

[73] *Id.* As I argue below, I do not believe that the argument that same-sex marriage undermines heterosexual marriage holds up under even minimal scrutiny. Same-sex marriage undermines heterosexual marriage only if the former is so inherently immoral or evil that its very existence destabilizes the latter.

This rationale is nothing more than a thinly veiled criticism of homosexuality itself and homosexuals themselves. The homophobia at the heart of this argument means that it ought not pass constitutional muster, even under the most easygoing of rational basis tests.

rights recognized in *Brown*.

As chronicled in Carol Polsgrove's important book *Divided Minds: Intellectuals and the Civil Rights Movement*,[74] white intellectuals, with a few exceptions, advised African Americans to be patient – even after the *Brown* decision and the 1964 Civil Rights Act and 1965 Voting Rights Act – rather than risk the anger and violence of white southerners. It took the lunchcounter sit-ins, and the publication of James Baldwin's essay *Letter from a Region of My Mind*, to give patronizing white academics a sense of African American anger.

The UVA professors gave bad legal advice after *Brown*. Professor Teachout and Kujovich gave the Vermont legislature bad legal advice after *Baker*. Maybe the lesson is to beware law professors bringing advice.

I want to answer the question elided by Professor Kujovich in his 2000 testimony. I do have a position on whether *Baker* was correctly decided. My position is that *Baker* was correctly decided, although it didn't go far enough.

I defended the legitimacy of *Baker* in 2000 and in my book,[75] and I am happy to do so again here. A prime purpose of the judiciary – perhaps *the* prime purpose – is to vindicate the basic civil rights and human rights of despised minorities.[76] The backlash to *Baker* and civil unions underscored the unpleasant reality that gays and lesbians are indeed despised minorities in Vermont.[77] Properly viewed, *Baker* was a civil rights case.[78] Gay marriage is a civil rights issue.[79]

The reality that gay marriage is a civil rights issue matters in any fair evaluation of the

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[74] CAROL POLSGROVE, DIVIDED MINDS (2001).

[75] *E.g.*, Mello, *For Today*, *supra*; MELLO, MARRIAGE, *supra* at 40-44.

[76] MELLO, MARRIAGE, *supra* at 40-44.

[77] *Id* at 45-141.

[78] *Id* at 42-44.

[79] *Id*.

civil unions statute. Laws draw lines all the time, and usually those lines are constitutionally acceptable. But when the law draws lines which exclude despised minorities, red flags should shoot up. Civil unions don't just exclude any old group from the legal institution of marriage. Civil unions exclude a historically despised group from marriage. Cue the red flags.

When the law draws lines which exclude despised groups, the *reasons* for those lines deserve special scrutiny. Thus, the question posed by the charge to this Commission – *why* did Vermont lawmakers in 2000 opt for civil unions, not marriage – goes to the heart of the matter.

The answer to that question is as simple as it was depressing. "Political reality."[80] Read: Homophobia.[81] That is the reason the Vermont legislature created a parallel institution of matrimony for same-sex couples rather than opening up the institution of marriage itself.[82]

That reason isn't good enough.

2. Political Reality: Governor Howard Dean and "Different But Equal"

> [The idea of same-sex marriage is dead], and I will use all the powers of my office to keep it dead
>
> Governor Howard Dean (Feb. 2000)[83]

Prejudice based on sexual orientation directly influenced the legislature's response to *Baker.* [84] The recognition of the "political reality" of opposition to same-sex couples was evident from the very beginning of the process that culminated with passage of the civil union bill. [85]

Vermont Governor Howard Dean set the state's political path after *Baker* with clarity, consistency and speed. The day *Baker* was decided in December 1999, Governor Dean stated that he supported a domestic partnership bill, but that he would not look kindly on including

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[80] *Id.* at 74-141.

[81] *Id.* at 45-192.

[82] *Id.* at 141-192.

[83] Jack Hoffman, *Panel Backs Domestic Partnership*, Rutland Herald, Feb. 10, 2000.

[84] M ELLO, MARRIAGE, *supra*, at 44-141.

[85] *Id.* at 74-141.

same-sex couples in the marriage laws.[86] Governor Dean strongly advocated for an approach he described as "different but equal."[87] Dean apparently was attempting to distinguish his position from the separate-but-equal rationale that supported Jim Crow segregation in the south. Dean never quite explained the difference between "different but equal" and "separate but equal." When pressed, Dean became testy.[88]

Dean maintained this position – support for domestic partnerships, relentless opposition to same-sex marriage – consistently throughout the contentious debates over civil unions in 2000. Dean set the tone and defined what was possible.

"Almost to a person, [House Judiciary Committee] members said they had to recognize the political realities [*i.e.*, that marriage was not a viable option politically] both within the statehouse and among the public."[89] That was why the House Judiciary Committee's first action was to take marriage off the table—a move hailed by Governor Dean's declaration that the marriage option was dead and that he promised to use "all the powers of this office" to keep it dead.[90] A *Time* magazine story about the House bill began by noting accurately that "*Vermont isn't about to legalize gay marriage. That's what state lawmakers were insisting* last week after its House of Representatives passed legislation allowing 'civil unions' for same-sex couples. And that's what the bill says. It specifically defines marriage as a union between a man and a woman."[91] The magazine also noted that the issue has generated "a fire storm of protest."[92]

Governor Dean left no doubt that the legislative distinction between heterosexual

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[86] Frederick Bever, *Lawmakers Face "Thornier Issue,"* Times Argus, Dec. 23, 1999.

[87] Diane Derby, *Governor Defends "Different But Equal,"* Rutland Herald, Dec. 23, 1999.

[88] *Id*.

[89] Ross Sneyd, AP, *Domestic Partnership Supported*, Valley News, Feb. 10, 2000.

[90] Jack Hoffman, *Panel Backs Domestic Partnership*, Rutland Herald, Feb. 10, 2000 (quoting Gov. Howard Dean).

[91] Tammerlin Drummond, *A Win For Gays*, Time, March 27, 2000 (emphasis added).

[92] *Id*.

marriages and gay civil unions was central to the political palatability of the unions bill. Responding to critics who "claimed that the House bill ignores the will of the majority," Dean "said that the House Judiciary Committee responded to the public's concern when it rejected a bill that would have supported same-sex marriage."[93] The governor explained, the Judiciary Committee "eliminated same-sex marriage because they heard from the public, so I think they are listening to the public."[94] As for the governor himself, the legal distinction between "traditional" heterosexual marriage and same-sex couples was critical to his own support for the House bill: "Dean said he had become one of the proposals' biggest supporters since the House Judiciary Committee adding language defining marriage as a union between a man and a woman."[95] The governor was pleased when the House Judiciary Committee rejected the marriage option. Governor Dean promised to use "the powers of this office"[96] to ensure that the marriage option remained off the table.

3. Political Reality: The Judiciary Committees

> Even though I am your native daughter, and my children are your native children, I don't have the same rights as my neighbors.
>
> Melissa Wells, of Richford, testifying before this Commission (Oct. 10, 2007)[97]

Likewise, Senator Vincent Illuzzi, "who was once a supporter of benefits for same-sex couples," reportedly said that "public opposition to same-sex marriage and to the civil unions bill passed by the House had led him to reverse his position"[98] and introduce a bill calling for amendment of the state constitution. "He had introduced a bill that would provide some legal

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[93] Diane Derby, *Dean Says Issue Is One of Conscience*, Rutland Herald, March 16, 2000.

[94] *Id*. (quoting Governor Howard Dean).

[95] Ross Sneyd, AP, *Dean to Lawmakers: Let Your Conscience Guide*, Valley News, March 15, 2000.

[96] Jack Hoffman, *Panel Backs Domestic Partnership*, Rutland Herald, Feb. 10, 2000.

[97] Nathan Burgess, *Gay Marriage Forum Held*, County Courier, Oct. 18, 2007 (quoting Melissa Wells).

[98] Jack Hoffman, *Caution Urged on Amendment*, Rutland Herald, March 24, 2000.

benefits to same-sex couples as well as relatives . . . Illuzzi said he had worked for three months to generate support for his bill, but couldn't"[99] so he "put aside that proposal and in its place offered a constitutional amendment that he said reflected the wishes of his constituents."[100] Illuzzi explained: "I'm trying to articulate in a constitutional framework what I've heard from my constituents . . . I'm sympathetic to domestic partnership. My constituents aren't. If there's a choice between what they want and what I want, they win."[101]

Legislators in both the House and Senate who voted for the civil unions bill stressed that it was *not* a marriage bill. A member of the House said "emphatically"[102] that the bill passed was "'definitely not gay marriage—I think *we all very clearly got the message that people did not want gay marriage.*'"[103] Another "said that the bill 'is very clearly not a marriage bill. We put in the bill that marriage is between a man and a woman.'"[104]

4. Political Reality: The Ad Wars, and the "Lie" That Civil Unions Were Equal To Marriage

> Marriage is the gold standard in committed relationships for adults. We are reaching for that gold, not just for us, but for our children and grandchildren
>
> Michael Saint-Joseph, of Enosburg Falls, testifying before this Commission[105]

As discussed above, members of the House Judiciary Committee were explicit that they were bowing to "political reality" in opting for civil unions rather than marriage.[106] That

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[99] *Id.*

[100] *Id.*

[101] Adam Lisberg, *Two Senators On Panel Seek Gay-Marriage Ban*, Burlington Free Press, March 22, 2000 (quoting Sen. Vincent Illuzzi).

[102] Sandy Cooch, *Legislators Explain Their Votes*, The Herald of Randolph, March 23, 2000.

[103] *Id.* (quoting Rep. Marion Milne) (emphasis added).

[104] *Id.* (quoting Rep. Carolyn Kehler).

[105] Daniel Barlow, *Gay Marriage Commission [sic] Begins Public Hearings*, Times Argus, Oct. 12, 2007.

[106] M ELLO, MARRIAGE, *supra*.

"political reality" was homophobia in Vermont.[107] Also in response to the political reality of the unpopularity of homosexuals, the committee's bill included a factfinding (later added to the substantive provisions of the bill itself) defining marriage as a union between a man and a woman—thus making clear that same-sex couples were being relegated *by law* to second-class matrimonial citizenship.[108] Without this stipulation, the governor would not have worked hard to persuade the legislature to pass the bill. Even with the governor's efforts, the civil unions bill passed the full House by a margin of 79-68.[109] An amendment to the bill that would have expanded marriage to include same-sex couples was massacred in the full House, 125 to 22.[110]

Similarly, in the Senate, Senator Richard Sears, the bill's leading advocate—responding to a colleague's claim that the bill would "'degrade the institution of matrimony'"–[111] stressed that "the bill included language to make it clear that marriage would only be between a man and a woman. A constitutional amendment wasn't necessary, he said."[112] Another Senator, Jeb Spaulding, noted that the bill was a compromise with those who saw it as a threat to traditional marriage: "Soon after the supreme court ruling, Spaulding had urged the legislature to allow gays and lesbians to marry. While he still supports that, he said the civil unions bill provides some comfort for people who want to protect traditional marriage because it does define marriage as a union between a man and a woman."[113]

The importance of the legal distinction between heterosexual marriage and same-sex civil unions was also suggested by the heated response to an advertisement that accused them of

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[107] *Id.*

[108] *Id.*

[109] Ross Sneyd, *Vermont House Votes in Favor of Civil Unions*, Valley News, March 16, 2000.

[110] M ELLO, MARRIAGE, *supra.*

[111] Nancy Remsen and Adam Lisberg, *Senate Backs Civil Unions*, Burlington Free Press, April 19, 2000 (quoting Sen. Julius Canns and citing Sen. Judiciary Committee Chairman Richard Sears).

[112] *Id.*

[113] *Id.*

having voted for same-sex marriage. On March 21, a subsidiary of the advocacy group Take It To the People[114] ran an ad in the state's two largest newspapers, the *Burlington Free Press* and the *Rutland Herald*. The ad declared "House passes gay marriage" and "The following [76] legislators voted against traditional Vermont family values."[115] The ad then listed the 76 House members who voted for the civil unions bill.

However, as the AP reported, the House "took pains to make civil unions *a separate and distinct legal structure* in the face of reluctance to broaden the marriage statutes themselves. . . . That's why House members who voted for the bill were so upset"[116] with the ads. Top leaders in the House criticized the ad's failure to distinguish between heterosexual marriage and same-sex unions as "false and misleading."[117] The Speaker of the House noted: "All we're asking is to be accurate, not misleading."[118]

Similarly, the *Rutland Herald* railed against the ad's equation of the civil unions bill with marriage. In the lead editorial published on the Sunday following the ad's appearance, the newspaper called the ad a "lie" because the ad "based on a hidden assumption: that same-sex marriage and civil unions are the same thing."[119] But "the House did not pass same-sex marriage. The House passed a bill creating civil unions."[120] The ad's equating marriage with civil unions "rely on lies and distortion" and are part of a "cloud of misinformation swirling around the House," editorialized the *Herald*.[121]

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[114] *See generally* MELLO, MARRIAGE, *supra.*

[115] Ross Sneyd, AP, *Ad Campaign Sparks Criticism By Speaker*, Rutland Herald, March 22, 2000 (emphasis added).

[116] AP, *House Speaker Angry Over "Gay Marriage" Advertisements*, Valley News, March 22, 2000.

[117] *Id.*

[118] *Id.* (quoting House Speaker Michael Obuchowski).

[119] Editorial, *Misinformation Campaign*, Rutland Herald, March 26, 2000.

[120] *Id.*

[121] *Id.*

Representative Cathy Voyer called "a blatant lie"[122] the ad that chided her and other Representatives for voting for "homosexual marriage."[123] Representative Voyer "noted that she and most of the other lawmakers mentioned [in the ad] had actually voted against an amendment to the House bill on civil unions that explicitly would have opened the state's marriage statutes to include same-sex couples.[124]

The governor concurred. Governor Dean, in a newspaper op ed piece published on March 29, responded to the ads and defended civil unions for same-sex couples as he had all along: Civil unions were not marriage. "Some opponents of the legislation have campaigned on what this bill is not,"[125] the governor re-emphasized. "The bill is not a gay-marriage bill. The bill defines marriage as a union between a man and a woman."[126]

Thus, the history of the civil unions statute suggests that the bill was in no small part passed out of a desire to exclude same-sex couples from marriage. One potent argument made in support of the civil unions bill was that, if the legislature did not act, the supreme court might well impose marriage as a remedy for the constitutional right recognized in *Baker*. That, in fact, was a realistic reading of the *Baker* decision, and it underscored the "political reality" that undermined the proposition that the statute was not quite a law enacted to extend civil rights to gay and lesbian couples. The statute was, at least, in part, a way to prevent same-sex couples from inclusion into the institution of marriage. But-for the fact that the statute explicitly was *not* marriage, the bill never would have passed the legislature—partly because the governor was adamantly opposed to allowing same-sex couples to marry.

Some legislators who voted against civil unions and marriage were frank that the

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[122] Vermont Press Bureau, *Legislators Angry About Ad By Terry*, Rutland Herald, April 6, 2000.

[123] Advertisement, Rutland Herald (citing Rep. Cathy Voyer).

[124] Vermont Press Bureau, *Legislators Angry About Ad By Terry*, Rutland Herald, April 6, 2000.

[125] Governor Howard Dean, *Rise Above Rancor When Debating Equal Rights For Gays*, Burlington Free Press, March 29, 2000.

[126] *Id.*

influence their constituents influenced their votes. A House member "said that constituent opinion influenced his vote. He received an estimated 300 e-mails, calls and letters, and only 22, he said, were 'for.' 'That's about a 15:1 ratio,' he said, 'and you can't ignore that.' [He] said poll results also helped him gauge public opinion."[127] Another echoed these sentiments.[128]

As a case study in how "political reality" warped the legislature's response to *Baker*, consider the case of Representative William Mackinnon. Mackinnon, a Democrat, believed that true equality for same-sex couples required the right to marry. Mackinnon voted against the civil unions bill "because he firmly believes that the only proper solution is 'an inclusive civil marriage.' Mackinnon says he remains convinced that one type of union for all couples, be they hetero- or homosexual, 'is the constitutionally correct thing to do.' 'I think that history will bear me out on that,' he said, adding that he thought a future court may find this civil unions bill 'untenable.'"[129]

Based on his convictions, Mackinnon voted against the civil unions bill in the House Judiciary Committee. That earned him a rebuke from the only openly-gay member of the committee and the House: Mackinnon's view was "shortsighted and not supportive of the gay and lesbian community in Vermont."[130]

Then the pressure on Mackinnon to bend to "political reality" began in earnest. The House Majority Leader tried to persuade Mackinnon to vote for the bill when it came before the full House.[131] So did MacKinnon's colleague from his district.[132] So did Governor Dean, who

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[127] Sandy Cooch, *Legislators Explain Their Votes*, The Herald of Randolph, March 23, 2000 (quoting Rep. Philip Angell).

[128] *Id.* (citing Rep. Henry Holmes).

[129] Sandy Cooch, *Legislators Explain Their Votes*, The Herald of Randolph, March 23, 2000 (quoting Rep. William Mackinnon).

[130] Jim Kenyon, *Civil Union Debate: The Winners and Losers*, Valley News, March 19, 2000 (quoting Rep. William Lippert).

[131] *Id.*

[132] *Id.*

"called MacKinnon into his office for a private conversation, but gave up after 35 minutes."[133]

That wasn't all. An important fundraiser in Mackinnon's district (who also happened to be vice-chair of the state Democratic Party), wrote a letter to the leading local newspaper arguing that Mackinnon's position "undercut"[134] support for the bill.

MacKinnon didn't budge. He voted against the bill in the full House because it did not allow same-sex couples to marry. "It's widely thought that his vote against civil unions will cost him his seat on the Judiciary Committee next year. There's also a possibility that Democrats will try to throw MacKinnon overboard by finding an opponent to run against him in the September primary."[135] The thoughtful commentator Steve Nelson rose to Mackinnon's defense,[136] but Nelson's voice was virtually the only public dissenter to the chorus of condemnation heaped on MacKinnon.[137] (MacKinnon eventually voted for the bill when it returned to the House following Senate action, after being thanked for his no vote by Take It To The People).[138]

C. THE MASSACHUSETTS COURT EXPLICITLY REJECTED CIVIL UNIONS IN FAVOR OF MARRIAGE, BECAUSE "THE HISTORY OF OUR NATION HAS DEMONSTRATED THAT SEPARATE IS SELDOM, IF EVER, EQUAL"

> [It would be] different but equal
>
> Governor Howard Dean, responding to the charge that civil unions would be separate-but-equal to marriage[139]

1. *Goodridge I*: Recognizing Same-Sex Marriage

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[133] *Id.*

[134] *Id*.

[135] *Id.*

[136] Steve Nelson, *Mackinnon Shouldn't Be Bashed For Sticking to Principle*, Valley News, March 26, 2000.

[137] *E.g.*, Letter to the Editor, Valley News, March 26, 2000.

[138] M ELLO, MARRIAGE, *supra*.

[139] Editorial, *Gay Rights Ping Pong?*, Rutland Herald, Dec. 26, 1999 (quoting Vermont Governor Howard Dean.) "Later, Dean was chagrined to say that his lawyer had advised him that 'different but equal' was not a good way to describe the goals of a domestic partnership bill." *Id.*

What a difference three years can make. In 2000, Vermont's civil union law was a pioneering step forward for marital equality. By 2003, when Massachusetts' highest court decided the *Goodridge* case, civil unions seemed almost "blase."[140] The debate had moved on to marriage.

The lawyers for the same-sex couples in *Goodridge* argued vehemently against civil unions as a substitute for marriage. The court agreed.

Decision day in *Goodridge v. Department of Public Health* (*Goodridge I*) came on November 18, 2003.[141] By a razor-thin margin, the Supreme Judicial Court of Massachusetts ruled that "the right to marry means little if it does not include the right to marry the person of

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[140] Johnson, *Reappraisal*, *supra*

[141] Goodridge v. Department of Health, 798 N.E. 941 (Mass. 2003) (*GoodridgeI*). *See generally, e.g.,* Kathleen Burge, *Gays Have Right to Marry, SJC Says in Historic Ruling,* BOSTON GLOBE, Nov. 19, 2003; Frank Phillips, *Lawmakers Are Divided on Response,* BOSTON GLOBE, Nov. 19, 2003; Anne Kornblut, *Some Republicans See Decision as an Issue to Run Against in '04*, BOSTON GLOBE, *Nov.* 19,2003; Yvonne Abraham, *Proposals and Tears Flow in Wake of Decision,* BOSTON GLOBE, Nov, 19, 2003; Michael Paulson, *Strong, Divided Opinions Mark Clergy Reaction*, BOSTON GLOBE, Nov. 19, 2003; Editiorial, *Equal Rights – and Rites,* BOSTON GLOBE, Nov. 19, 2003; Eileen McNamara, *On Marriage,. Simple Justice,* BOSTON GLOBE, Nov. 19,2003; Elizabeth Beardsley, *They Do,* BOSTON HERALD, Nov. 19, 2003; Editorial, *SJC on Marriage Not the Last Word,* BOSTON HERALD, Nov. 19,2003; Cal Thomas, *Divorce from Decency in Mass.,* BOSTON HERALD, Nov. 19, 2003; Thomas Keane, *Gay Wedding Bells Aren't Ringing Yet,* BOSTON HERALD, Nov. 19,2003; Bowie Carr, *Layabout Legislators Left Door Open for Court Jesters,* BOSTON HERALD, Nov. 19, 2003; Joe Fitzgerald, *Inching Closer to Shameful Reality*, BOSTON HERALD, Nov. 19, 2003; Margery Egan, *Finally, Equality and Justice For All*, BOSTON HERALD, Nov, 19, 2003; Pam Belluck, *Marriage by Gays Gains Big Victory in Massachusetts*, N.Y. TIMES, Nov. 19, 2003; Adam Nagourney, *A Thorney Issue for 2004 Race*, N.Y. TIMES, Nov.19, 2003; Frank Phillips, *Civil Union Law Sought,* BOSTON GLOBE, Nov, 20, 2003; Raphael Lewis, *Groups Muster to Fight Gay Marriage in Mass.,* BOSTON GLOBE, Nov. 20, 2003; Rick Klien, *Career on Line, Romney in Eye of Hurricane,* BOSTON GLOBE, Nov. 20, 2003; Benjamin Gedan, *Cambridge Poised to Issue Licenses Amid Controversy,* BOSTON GLOBE, Nov. 21, 2003; Pam Belluck, *Gays' Victory Leaves Massachusetts Lawmakers Hesitant*, N.Y. TIMES, Nov. 20,2003; Katharine Steelye, *Conservatives Mobilize Against Ruling on Gay Marriage*, N.Y. TIMES, Nov. 20, 2003; Editorial, *A Victory for Gay Marriage*, N.Y. TIMES, Nov. 20,2003; Frank Phillips, *Reilly Supports Same-Sex Benefits Without Marriage,* BOSTON GLOBE, Nov. 21, 2003; *Editorial, There's No Point in Rushing,* BOSTON HERALD, Nov, 21,2003; Jay Ambrose, *Judicial Tyranny Defines Mass.*, BOSTON HERALD, Nov. 21, 2003; Thomas Caywood, *Right Wing Revs Up for "Last Stand" in Bay State,* BOSTON HERALD, Nov. 21, 2003; Eric Convey, *Backlash: Church Warns Pots: Gay Decision May Cost Votes,* BOSTON HERALD, Nov. 22, 2003, Elisabeth Beardsley, *Gays Rip Pols on Union Bill*, BOSTON HERALD, Nov. 22, 2003; Raphael Lewis, *Romney, AG Takes Heat on Marriage Issue*, BOSTON GLOBE, Nov. 22, 2003; Frank Phillips, 50% in *Poll Back SJC Ruling on Gay Marriage,* BOSTON GLOBE, Nov. 23,2003; Jeff Jacoby, *Gay Ruling Echoes Roe v. Wade*, BOSTON GLOBE, Nov. 23,2003; David Guarino, *Same-Sex Benefits Get Voters' Blessing: Poll: Most OK Gay Marriage,* BOSTON HERALD, Nov. 23, 2003; AP, *Expect Homily on Homosexuality*, BOSTON HERALD, Nov. 23,2003; David Guarinc, *Constitutional Ban Will Be "Uphill Battle" in Bay State*, BOSTON HERALD, Nov. 23, 2003; Howie Carr, *Give Reps a Ring on Gay Marriage*, BOSTON HERALD, Nov. 23,2003; Maggie Gallagher, *Massachusetts vs. Marriage: How to Save an Institution,* WEEKLY STANDARD, Dec. 1, 2003 (cover story); Editorial, *Mass Appeal,* NEW REPUBLIC, Dec. 1., 2003; Marcia Coyle, *Wedding March?*, NATIONAL L.J., Nov. 24,2004,- Howard Fineman, *My Mommies Can Marry,* NEWSWEEK, Doc.1, 2003; Richard Lacayo, *Popping the Question*, TIME, Dec. 1, 2003.

one's choice."[142] The lead opinion in *Goodridge* explained that the "Massachusetts constitution affirms the dignity of all individuals" and "forbids the creation of second-class citizens."[143] The marriage ban "works a deep and scaring hardship" on same-sex families "for no rational reason."[144] The court stayed the entry of judgment for 180 days to permit the legislature to take such action as it may deem appropriate in light of this decision."[145]

Media reports characterized *Goodridge as* a 4-3 decision. In. fact, the court split 4-3 and 3-1-3, and there was no way to tell which portions of the lead opinion were majority and which are plurality. Chief Justice Margaret Marshall wrote the lead opinion, in which two other justices joined in full. Her opinion reformulated the common-law definition of civil marriage to mean "the voluntary union of two people as spouses, to the exclusion of all others." "Marriage is a vital *social* institution," wrote the chief justice.[146] "The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society."[147] For those people "who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits."[148] The court maintained that its decision "does not disturb the fundamental value of marriage in our society."[149] Limiting marriage to heterosexual couples prevents the children of same-sex unions "from enjoying the immeasurable advantages that flow from. the assurance of a stable family structure in which children will be reared, educated, and

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[142] *Goodridge I supra*.

[143] *Id*.

[144] *Id*.

[145] *Id*.

[146] *Id*. (emphasis in original).

[147] *Id*.

[148] *Id*.

[149] *Id*.

socialized."[150] It cannot be "rational under our laws to penalize children by depriving them of state benefits because of their parents' sexual orientation."[151]

The lead *Goodridge* opinion discussed and rejected several rationales for prohibiting same-sex couples from marrying. The government had asserted that the state's interest in regulating marriage was based on the notion that marriage's primary purpose was procreation. The court flatly responded: "This is not correct."[152] Marriage laws in Massachusetts "contain no requirement that applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce."[153] Heterosexual couples "who never consummated their marriage, and never plan to, may be and stay married."[154] Heterosexual "people who cannot stir from their deathbed may marry."[155] In short, "it is the exclusive and permanent commitment of the marriage partners to the marriage, not the begetting of children, that is the *sine qua non* of marriage."[156]

The state also argued that confining marriage to opposite-sex couples ensured the optimal setting for child rearing. However, the government "readily conceded that people in same-sex couples may be 'excellent' parents."[157] Gay and lesbian couples "have children for the same reason others do—to love them, to care for them, to nurture them. But the task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws."[158]

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[150] *Id*.

[151] *Id*.

[152] *Id*.

[153] *Id*.

[154] *Id*.

[155] *Id*.

[156] *Id*.

[157] *Id*.

[158] *Id*.

The laws of Massachusetts provide a "cornucopia of substantial benefits to married parents and their children," but "we are confronted with an entire, sizable class of parents raising children who have absolutely no access to civil marriage and its protections bemuse they are forbidden from procuring a marriage license."[159] The marriage ban was what harmed the children of same-sex parents. Striking down the ban would help children.

The government further contended that broadening civil marriage to include gay couples would trivialize or destroy traditional marriage. The court countered that the couples in *Goodridge* "seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any other gate-keeping provisions of the marriage licensing laws."[160] Allowing same-sex marriage "will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race."[161] To the contrary, "extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laves and in the human spirit."[162]

At first blush, it appeared that the *Goodridge* court required same-sex marriage. But did it? Did the *Goodridge* court mandate gay marriage, or would a parallel system of benefits—civil unions, for example—pass muster under the state constitution? I honestly couldn't tell from the court's lead opinion.[163] The commentary on *Goodridge* amounted to a Rorschach blot; it revealed

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[159] *Id*.

[160] *Id*.

[161] *Id*.

[162] *Id*.

[163] M ELLO, MARRIAGE, *supra*.

more about the preconceived attitudes and biases of the commentators than it dids the *Goodridge* opinion itself.

On the one hand, *Goodridge* emphasized the importance of the freedom of choice to marry and of the right to privacy in making intimate decisions. The court treated marriage as a civil right, and the ruling did not say whether civil unions might suffice. Harvard Law School Professors Lawrence Tribe and Elizabeth Bartholet read *Goodridge* as requiring marriage.[164]

On the other hand, Governor Mitt Romney and State Attorney General Thomas Reilly read *Goodridge* to suggest that a civil unions statute would be enough.[165] The question before the *Goodridge* court was "whether, consistent with the Massachusetts's constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage" to gay couples.[166] And the dispositional portion of the *Goodridge* opinion held that "barring an individual from the *protections, benefits, and obligations of civil marriage* solely because that person would marry a person of the same sex violates the Massachusetts Constitution."[167] Further, although the court said that the constitution "forbids the creation of second-class citizens,"[168] it is not clear that civil unions constituted second-class citizenship. The Vermont Supreme Court, the Vermont legislature, and gay-rights academics such as William Eskridge and Greg Johnson argue that civil unions are not second-class citizenship. I disagree, but reasonable people can conclude that civil unions are not second-class citizenship. Finally, the lead opinion in *Goodridge was* in part a plurality, not a majority, opinion. The fourth vote was provided by Justice John Greaney, who concurred "with the result reached by the court, the remedy ordered,

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[164] Frank Phillips, *Civil Union Law Sought*, BOSTON GLOBE, Nov. 20, 2003; Kathleen Burge, *Legislature Given 180 Days*, BOSTON GLOBE, Nov. 19, 2003.

[165] Phillips, *Civil Union Law Sought*, *supra*; Frank Phillips, *Reilly Supports Same-Sex Benefits without Marriage*, BOSTON GLOBE, Nov. 21, 2003.

[166] *Id*. (emphasis added).

[167] *Goodridge I*, *supra*. (emphasis added).

[168] *Id*.

and much of the reasoning in the court's opinion."[169] Because Justice Greaney did not specify with which parts of the lead opinion he agreed, there was no way to tell which portions of the lead opinion were majority and which were plurality. Massachusetts could "overrule" *Goodridge* by amending the state constitution, but such an amendment could not have been finalized until November 2006 because it must be approved by the legislature in two consecutive sessions, and then sent to the voters for ratification.[170]

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[169] *Id*.

[170] In a superb editorial, the *Rutland Herald* suggested lessons Massachusetts could learn from Vermont:

> The issue of gay marriage has put the state of Massachusetts into an uproar, with fearful politicians grasping for a strategy that will protect them from angry constituents while fulfilling the constitutional mandate issuing from the state's high court.
>
> There are lessons the people of Massachusetts could take from the experience of Vermont, which was consumed by a similar uproar four years ago.
>
> Lesson One: There is no escaping this issue. Gay and lesbian Americans have been working for years to secure rights and protections that everyone else t for granted. As it was for African Americans, equality in marriage for homosexuals has been the last taboo to fall. Now the Supreme Judicial Court in Massachusetts has determined that equality in marriage is required by the state constitution. No one can run away from that fact.
>
> Lesson Two: The issue of marriage is volatile because it involves our deepest passions and our most important human connections. But the emotion attached to the issue does not prevent political leaders from proceeding in a respectful, restrained manner, conducting a political dialogue that gives everyone his or her say and allows for constructive democratic action.
>
> Lesson Three: A respectful dialogue requires parties on both sides of question to recognize the humanity of the other side. Bigotry and homophobia exist. As Vermont lawmakers drew up the civil unions law in 2000, they were exposed to vicious and relentless attacks. But opposition to civil unions also arose from the legitimate beliefs of decent people who were seeking to follow the moral teaching of their churches or their consciences. Conversely, support for civil unions came from decent people, gay and straight, who were following their own moral understanding in seeking to widen the arena of tolerance and to secure equal rights for gay and lesbian Vermonters.
>
> Lesson Four: Debate is not harmful. Vermont Chief Justice Jeffrey Amestoy wrote a ruling in 1999 that gave the Vermont Legislature the job of approving either gay marriage or a "parallel institution" – which became civil unions. He believed that involving the legislature would be healthy for the state because it would engage the people in the political process and would put a stamp of democratic legitimacy on the outcome. The debate in the legislatures and around the state was often painful, bitter, and angry. But it was enormously educational. The result was that Vermonters gained an understanding of issues related to homosexuality and gay rights that few people have.
>
> Lesson Five: Anger and extremism do not pay. Legislators on the fence were more often than not persuaded to support civil unions because of the vicious language and intolerant attitudes of the most extreme opponents. They were also impressed favorably by the strength of conviction and dignity of gay and lesbian Vermonters who were willing to stand up for themselves and to defend in straightforward language the relationships that were central to their lives. The moral force of their arguments was hard to deny.
>
> Gay marriage is now a national issue, and Massachusetts has become the central battleground. It will be up to each participant to decide whether to exercise statesmanship or demagoguery. Statesmanship is possible. It requires a willingness to forgo cheap political points and a desire to promote a civil discourse that in the end will leave the state a better place.

Editorial, *Now Massachusetts,* RUTLAND HERALD, Nov. 21, 2003.

This was good advice for Massachusetts. It is also good advice for Vermont today, as we revisit

2. The Senate's Civil Unions Bill

> Sodomy is not an acceptable way to consummate a marriage. Even if you get this law, you will not win.
>
> Brian Pearl, of Grand Isle, testifying before this Commission (Oct. 10, 2007)[171]

Reaction to *Goodridge* was swift and thunderous. The Reverend Louis Sheldon, chairman of the Traditional Values Coalition in Washington, D.C., declared that "Massachusetts is our Iwo Jima. For us, it's our last stand. We're going to raise the flag."[172] A syndicated columnist accused the Massachusetts court of "judicial tyranny" and of "arrogating imperious powers to itself;" the opinion itself was "intellectually fraudulent."[173] Another columnist asked whether "homosexuals comprehend that marriages involve responsibilities as well as privileges? Blood tests, for one thing. . . . Do homosexuals really want to take blood tests? Maybe gays aren't worried about [sexually transmitted diseases] anymore."[174] This columnist contended that the court's "insanity" would require invalidation of legal bans on incest and polygamy.[175] Another syndicated columnist explained that marriage "was established by God as the best arrangement for fallen humanity to organize and protect itself and create and rear children"; warned that "what is happening in our culture is an unraveling of all we once considered normal"; and urged the voters in 2004 to "pull the country back from the precipice," stating that "marriage defined should be the social-issue centerpiece of the coming [presidential] campaign."[176] Another columnist declared "it's now midnight in Massachusetts," as the state "now inches closer to a shameful reality, all because of

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this hard issue.

[171] Daniel Barlow, *Gay Marriage Commission [sic] Begins Public Hearings*, Times Argus, Oct. 12, 2007 (quoting Brian Pearl).

[172] Thomas Caywood, *Right Wing Revs Up for "Last Stand" in Bay State*, BOSTON HERALD, Nov. 21, 2003.

[173] Jay Ambrose, *Judicial Tyranny Defines Mass.,* BOSTON HERALD, Nov. 21, 2003.

[174] Howie Carr, *Give Reps a Ring*, BOSTON HERALD, Nov. 23, 2003.

[175] *Id*.

[176] Cal Thomas, *Divorce From Decency in Mass.,* BOSTON HERALD, Nov. 19, 2003.

the success militant homosexuals have had" in pushing their "aberrant agenda."[177] The official newspaper of the Catholic Archdiocese of Boston warned Democratic politicians that a "new political reality certainly requires careful consideration of the way Catholics cast their votes. Catholics need to seek out their candidates' views and positions on crucial issues, such as the definition of marriage."[178]

The Massachusetts Senate had before it a bill creating civil unions rather than marriage. The bill was a replica of Vermont's civil unions statute. The Massachusetts Senate asked the state's high court for an opinion on whether civil unions would satisfy the commands of *Goodridge I*.

3. *Goodridge II*: Civil Unions Are Not Enough, Because "Separate Is Seldom, If Ever, Equal"

> We ask the Commission to recognize marriage as it is now, between a man and a woman
>
> Claire LaBounty, of St. Albans, testifying before this Commission (Oct. 10, 2007)[179]

The Massachusetts court received briefs from a wide variety of interested parties, including a brief which reads like a who's-who among civil rights organizations:

- UNITED STATES REPRESENTATIVE JOHN LEWIS
- THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION
- THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS
- THE ASIAN-AMERICAN LAWYERS ASSOCIATION OF MASSACHUSETTS
- THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND
- THE BOSTON BAR ASSOCIATION
- COMMUNITY CHANGE, INC.
- THE FAIR HOUSING CENTER OF GREATER BOSTON
- THE GREATER BOSTON CIVIL RIGHTS COALITION
- THE JEWISH ALLIANCE FOR LAW AND SOCIAL ACTION
- JUSTICE RESOURCE INSTITUTE, INC.

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[177] Joe Fitzgerald, *Inching Closer to Shameful Reality*, BOSTON HERALD, Nov, 11, 2003.

[178] Eric Convey, *Backlash,* BOSTON HERALD, Nov. 22, 20(13 (quoting *The Pilot*).

[179] Daniel Barlow, *Gay Marriage Commission [sic] Begins Public Hearings*, Times Argus, Oct. 12, 2007 (quoting Claire LaBounty).

- JRI HEALTH; LAMBDA LEGAL DEFENSE AND EDUCATION FUND
- LA RAZA CENTRO LEGAL
- THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF THE BOSTON BAR ASSOCIATION
- LLEGO, THE NATIONAL LATINA/O LESBIAN, GAY, BISEXUAL AND TRANSGENDER ORGANIZATION
- THE MASSACHUSETTS ASSOCIATION OF HISPANIC ATTORNEYS
- THE MASSACHUSETTS BLACK WOMEN ATTORNEYS
- THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM
- THE NATIONAL ASSOCIATION OF WOMEN LAWYERS
- THE NATIONAL ASSOCIATION OF SOCIAL WORKERS
- THE NATIONAL ASSOCIATION OF SOCIAL WORKERS MASSACHUSETTS CHAPTER
- TH E NATIONAL CENTER FOR LESBIAN RIGHTS
- THE NATIONAL COUNCIL OF JEWISH WOMEN, INC.
- THE NATIONAL LAWYERS GUILD LESBIAN, GAY, BISEXUAL AND TRANSGENDER COMMITTEE
- THE NATIONAL LAWYERS GUILD MASSACHUSETTS CHAPTER
- THE NATIONAL ORGANIZATION FOR WOMEN
- THE NORTHWEST WOMEN'S LAW CENTER
- NOW LEGAL DEFENSE AND EDUCATION FUND
- PEOPLE FOR THE AMERICAN WAY FOUNDATION
- SOULFORCE, INC.
- THE SOUTHERN POVERTY LAW CENTER
- THE URBAN LEAGUE OF EASTERN MASSACHUSETTS
- THE WOMEN'S BAR ASSOCIATION OF MASSACHUSETTS[180]

The brief asserted forcefully that civil unions resurrected the discredited doctrine of separate but equal.

Vermont lawyers Beth Robinson and Susan Murray—lead counsel for the Vermont same-sex couples in *Baker v. State*—also filed a brief to the Massachusetts high court in *Goodridge II*. Robinson and Murray were representing a number of groups:

- HUMAN RIGHTS CAMPAIGN
- NATIONAL GAY AND LESBIAN TASK FORCE
- MASSACHUSETTS LESBIAN AND GAY BAR ASSOCIATION
- MASSACHUSETTS GAY AND LESBIAN POLITICAL CAUCUS
- LESBIAN, GAY, BISEXUAL AND TRANSGENDER POLITICAL ALLIANCE OF WESTERN MASSACHUSETTS
- MASSACHUSETTS TEACHERS ASSOCIATION; HEALTH LAW ADVOCATES
- LESBIAN, GAY, BISEXUAL AND TRANSGENDER AGING PROJECT OF MASSACHUSETTS
- NATIONAL STONEWALL DEMOCRATS

[180] This brief is appended to this statement. *See* Attachment 2.

- FREEDOM TO MARRY COALITION OF MASSACHUSETTS
- FREEDOM TO MARRY
- FREEDOM TO MARY FOUNDATION
- RELIGIOUS COALITION FOR THE FREEDOM TO MARRY
- *VERMONT FREEDOM TO MARRY TASK FORCE*
- *VERMONTERS FOR CIVIL UNIONS LEGISLATIVE DEFENSE FUND*
- PRIDEPLANNERS™
- GALLAN/PRIDE AT WORK/AFL/CIO.[181]

This brief also made a "separate but equal" argument and tracing the history behind Vermont's civil unions statute.[182] Robinson and Murray outlined their argument as follows:

A. THE VERMONT SUPREME COURT DECLINED TO CONSIDER WHETHER A LAW SUCH AS VERMONT'S CIVIL UNION LAW SATISFIES THE REQUIREMENTS OF THE VERMONT CONSTITUTION.

B. THE VERMONT CIVIL UNION LAW RESULTED FROM A POLITICAL COMPROMISE BETWEEN TOTAL EXCLUSION OF SAME-SEX COUPLES AND TRUE EQUALITY FOR GAY AND LESBIAN CITIZENS.

C. THE STATUS OF BEING MARRIED *IS* ONE OF THE BENEFITS OF MARRIAGE.

1. Civil Unions Face Greater Obstacles To Portability

2. Couples Joined In Civil Union Are Severely Disadvantaged With Respect To Federal Benefits

3. Many Private Parties Attach Their Own Benefits To Marriage As Defined By Statute.[183]

And this is how they summarized their arguments:

In the spring of 2000, the Vermont Legislature passed a law creating a separate legal :institution and marital status for same-sex couples designated "civil union." 1999 Vt. Acts & Resolves 91 (the "Vermont, civil union law"). Like Mass. Sen. Bill 2175 (2003 Session) ("Senate Bill 2175"), the Vermont civil union law provides that "parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage." VT. STAT.ANN. tit. 15, § 1204(a) (2003); Senate Bill 2175, Section 5, subsection 4. Like Senate Bill 2175, the Vermont civil union law limits access to civil marriage to heterosexual couples, VT. STAT. ANN. tit. 15, § 1201(4) (2003) ; Senate Bill 2175, Section 5, subsection 3.

The Vermont civil union law greatly expands the legal protections and responsibilities available to same-sex couples, and in many ways the new law represents a significant step toward

[181] *See* Attachment 2.

[182] *See* Attachment 2.

[183] *See* Attachment 2.

true equality. However, the Vermont civil union law, like the proposed Massachusetts law, fails to satisfy the very constitutional requirements that inspired the law in the first place.

The Vermont Supreme Court has not resolved the question of whether Vermont's civil union law satisfies constitutional requirements; the court expressly left open that question in its opinion in Baker v. State, 744 A.2d 864 (1999), the case that led to the passage of Vermont's civil union law. Amici submit that it does not. The civil union law was created as a political compromise designed to provide legal, benefits and responsibilities to same-sex couples who, prior to the enactment of that law, had virtually no legal protection as families, it also was designed to accommodate the objections of those opposed to recognition or protections for such families. The civil union law reflects a compromise between true equality and no rights at all: in other words, it represents "partial equality."

The Vermont civil union law falls far short of the constitutional requirement of actual and full. inclusion for same-sex couples. By preventing same-sex couples from marrying, the law places beyond the reach of those couples and their families the significant social content and benefits that accompany the legal status of "marriage," relegating those couples to a second-class status that resonates with the now discredited Jim Crow laws of the segregated South.

Moreover, because the State of Vermont has withheld from same-sex couples the widely recognized and understood label of "married," those couples face significant practical obstacles as they travel or move outside of Vermont, as well as in connection with federal benefits and protections. Finally, many private parties outside of Vermont, including sponsors of health insurance plans, rely on the legal statue; of "marriage," to determine who is and is not eligible for their own privately conferred benefits. As the sovereign entity that can confer or deny the legal status of marriage, the State of Vermont is the keeper of the "gateway" to these various other state, federal, and privately conferred benefits. Access to that gateway is every bit as important as the various state law marital benefits that have been conferred on same-sex couples by virtue of Vermont's civil union law, and the denial of access to that gateway is a constitutionally fatal flaw in Vermont's civil union law.

Senate Bill 2175 fails to meet the requirements of the Massachusetts Constitution, articulated most recently and directly in this Court's decision in Goodridge v. Department of Health, 440 Mass. 309 (2003), for all of these same reasons.[184]

The brief asserted forcefully that civil unions resurrected the discredited doctrine of separate-but-equal:

> The bedrock principle of the Massachusetts Constitution that the right to equality "forbids the creation of second-class citizens," Goodridge, 440 Mass. at 312, has been elaborated by federal courts construing the similar equality guarantee in the United States Constitution. The United States Supreme Court has long recognized that the constitutional guarantee of equality is not only about equal opportunity to secure tangible things such as goods and services, education and employment. Rather, equality is intrinsically important and is protected for its own sake. "[T]he right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against." Heckler v. Mathews, 465 U.S. 728, 739 (1984). Thus, "discrimination itself" is a harm the Constitution does not tolerate without justification because it "stigmatiz[es) members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community." Id.

[184] *See* Attachment 2.

Unjustified government discrimination is inherently injurious, damaging the dignity and societal standing of members of the disfavored groups. See, e.g., id.; Allen v. Wright, 468 U.S. 737, 755 (1984) (the "stigmatizing injury often caused by . . . discrimination . . . is one of the most serious consequences of discriminatory . . . action"), Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724-25 (1982); Brown v. Board of Educ., 347 U.S. 483, 493-94 (1954). State discrimination diminishes the sense of self-worth of those discriminated against and invites and justifies private discrimination, denying them full participation in civic life. See, e.g., Lawrence v. Texas, 123 S. Ct. 2472, 2482 (2003) (holding sodomy laws unconstitutional because the continued existence of any laws criminalizing private, consensual same-sex sexual relationships would be "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres"); Strauder v. West Virginia, 100 U.S. 303, 308 (1879) (excluding black men from juries "is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to . . . race prejudice"). Unequal treatment that marks a group with a badge of inferiority betrays the constitutional promise of equality no less than more tangible forms of discrimination.

The starkest example of this betrayal and of the profound effects of a government stamp of inequality is this country's history of racial segregation. The cases that ultimately abolished this form of discrimination recognized the detrimental effects of segregation that has the "sanction of the law.'" Brown v. Board of Educ., 347 U.S. at 493-94 (noting that "the policy of separating the races is usually interpreted as denoting the inferiority of [African Americans]"). In Brown v. Board of Education, the Supreme Court recognized that establishing separate schools for black students "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Id. The recognition of this psychological harm is what led the Court to hold that "[s]eparate educational facilities are inherently unequal" – and thus unconstitutional – even when those schools had the same facilities and resources. Id. at 495; see also Watson v. Memphis, 373 U.S. 526, 538 (1963) (the sufficiency of separate recreational facilities for African Americans "is besides the point; it is the segregation by race that is unconstitutional").

It was this same concern about the stigmatizing effects of discrimination that led Justice Harlan to dissent passionately from the Court's endorsement of "separate but equal" in the context of public accommodations in Plessy v. Ferguson, 163 U.S. 537 (1896) (Harlan, J., dissenting). Legislating "separate but equal" railroad coaches for blacks and whites, Justice Harlan recognized, "proceed[ed] on the ground that [African Americans] are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens." Id. at 560. As the Court later acknowledged in Brown v. Board of Education and subsequent cases, the guarantee of equal protection does not permit a State to justify discrimination against a particular group simply by claiming to provide "'equal' accommodations." Id. at 552.

The principle that the Constitution demands equality for its own sake in order to prevent the psychological and social consequences of invidious discrimination was first articulated in response to racial segregation, but the United States Supreme Court also has rejected other forms of government discrimination that send the same message that some members of our community are not as worthy as others. For example, the Court now recognizes that rules and policies that relegate women to a separate sph3re are discriminatory and serve to reinforce stereotypes that women are "innately inferior." Hogan, 458 U.S. at 725;

Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973) ; see also Heckler, 465 U.S. at 739 (discussing in context of gender discrimination how "discrimination itself" stigmatizes the disfavored group as innately inferior); Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984) (gender discrimination "deprives persons of their individual dignity").

. . .

This Court has long recognized that the guarantees from establishing arbitrary or irrational classifications and from enacting invidious discrimination. See, e.g., Pinnick v. Cleary, 360 Mass. 1, 28 (1971). In Goodridge, this Court. held that excluding same-sex couples from the right to marry violates the Massachusetts Constitution. because "[i]n so doing, the State's action confers an official stamp of approval on the destructive stereotype that same-sex relationships are . . . inferior to opposite-sex relationships and are not worthy of respect.." 440 Mass. at 333. The proposed civil unions bill would continue to exclude lesbians and gay men from marriage and, thus, would continue to work a "deep and scarring hardship . . . for no rational reason." Id. at 341. The proposed separate system for recognizing the relationships of same-sex couples would create precisely the kind of "second-class citizenship" that the Massachusetts Constitution forbids. Id. at 312.

Recognizing this very point, the Court of Appeal for British Columbia, in mandating equal marriage for same-sex couples, held that "[a]ny other form of recognition for same-sex relationships, including the parallel institution of [registered domestic partnerships] falls short of true equality. This Court should not be asked to grant a remedy which makes same-sex couples 'almost equal', or to 1eave it to governments to choose amongst less-than-equal solutions." Barbeau v. Attorney Gen. of Canada, 2003 B.C.C.A. 251, para. 156 (2003). The Court of Appeal for Ontario agreed that an alternative system for recognizing same-sex relationships was insufficient, explaining that the right to equality ensures not only equal access to economic benefits, but also equal access to "fundamental societal institutions." Halpern v. Toronto, 172 O.A.C. 276, paras. 102-07 (2003). Excluding same-sex couples from marriage, the court held, "perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships." Id. at para. 107.

The very fact that the proposed civil unions bill would establish a separate status for same-sex couples, rather than implement this Court's mandate in Goodridge, demonstrates that the civil unions it proposes are not equal to marriage. The only proffered rationale for continuing to deny sam-sex couples entry into the institution of marriage, notwithstanding this Court's ruling, is to "preserv[e] the traditional, historic nature and meaning of the institution of marriage." Senate, No. 2175, Sec. 1. This Court, however, was "mindful" that its decision marks a change in the history of marriage law, Goodridge, 440 Mass. at 312, and that "history must yield to a more fully developed understanding of the invidious quality of the discrimination." Id. at 328. Invoking history and tradition to justify discrimination is nothing more than arguing that the law should be what it is because it has always been that way, which turns constitutional adjudication on its head. See, e.g., Lawrence, 123 S. Ct. at 2483 ("neither history nor tradition could save a law prohibiting miscegenation from constitutional attack") ; Halpern, 172 O.A.C. 276 at para. 117 ("[s]tating that marriage is heterosexual because it always has been heterosexual is merely an explanation for the opposite-sex requirement of marriage, it is not an objective that is capable of justifying" infringement on the guarantee of equality), Perez v. Sharp, 198 P.2d 17, 27 (Cal. 1948) ("[c]ertainly the fact alone that the discrimination has been sanctioned by the state for many years does not supply . . . justification"). If history and tradition were considered to be legitimate factors under the Constitution to justify

> government-sanctioned discrimination, our country would be a very different and far less hospitable nation indeed. See, eg,. Plessy, 163 U.S. at 550 (upholding law mandating separate but equal train accommodations because the legislature was "at liberty to act with reference to the established usages, customs and traditions of the people").[185]

The Massachusetts high court issued its decision in *Goodridge II* on January 4, 2004.[186] A majority of the justices explained that *Goodridge I* required marriage. Civil unions would not suffice: Civil unions would be an "unconstitutional, inferior, and discriminatory status for same-sex couples. . . . The history of our nation has demonstrated that separate is seldom, if ever, equal."[187] In other words, the Massachusetts court concluded that the only thing equal to marriage is marriage.

D. "SEPARATE" IS "INHERENTLY UNEQUAL": BADGES OF INFERIORITY, INTENDED AND UNINTENDED

In this section, I will argue that the civil rights organizations in *Goodridge II*—and Massachusetts high court—were right. The only thing equal to marriage is marriage. I will also explore exactly *why* the separate but equal doctrine was so wrong.

At the outset, however, I want to be clear about one difference between racial apartheid under *Plessy v. Ferguson* and civil unions in Vermont. Jim Crow laws were largely *intended* to stamp African Americans with a badge of inferiority throughout the south of my youth. The segregation systems under *Plessy* were largely *intended* to mark African Americans with a badge of inferiority. Segregation was an aspect of white supremacy.

Civil unions were not largely *intended* to stamp same-sex couples with such a badge of inferiority. To the contrary, civil unions were *intended* to provide as much marital equality as was politically possible and realistic in 2000. This distinction—that racial segregation was intended to communicate a message of second-class citizenship, while civil unions were *intended* to send the opposite message—is at the heart of Professors Eskridge and Johnson's defenses of

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[185] *See* Attachment 2.

[186] Opinions of the Justices to the Senate, 802 N.E. 2d 565 (2004) (*Goodridge II*).

[187] *See* Attachment 2.

civil unions.

Professor Greg Johnson put it this way:

> Even if civil union bestows every marital benefit on same-sex couples, including portability, should the lesbian/gay community accept it socially and culturally as a step forward? To many supporters of same-sex marriage, civil union reeks of discrimination. They consider it an unconstitutional "separate-but-equal" regime akin to the Jim Crow laws struck down by the Supreme Court in. *Brown v. Board of Education* and other cases. From the time of the law's passage, I have defended civil union against this charge. It is simply too facile to compare the civil union law to the Jim Crow laws of the Old South. Jim Crow laws established segregated facilities that infringed on the rights African-Americans gained through the Civil War Amendments. Conversely, the civil union law is expansive legislation, extending a host of: rights to same-sex couples they never had before. Jim Crow laws were passed with malice by racist legislatures hell-bent on subjugating African Americans. The civil union law was passed by a legislature earnestly trying to do the right thing. Jim Crow laws pandered to the masses and to the white establishment. The civil union law represents. a courageous attempt by a legislature to vote its conscience in the face of fierce protest and opposition. Indeed, as I have mentioned, some legislators lost their seats because of their support for civil union." I doubt this was ever true for anyone, who voted in favor of a Jim Crow law.[188]

> And Professor Eskridge:
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> I am a classic liberal and a gay person who supports legal recognition of same-sex marriages. My last both; criticized the twentieth-century legal regime that created an ‘apartheid of the closet' for GLBT people. Yet I do not think the civil unions law creates an apartheid. . . . Nor do I believe, the analogy to *Plessy* holds up. Formally, the law neither separates citizens nor, equalizes their entitlements. Functionally, the law ameliorates rather than ratifies a sexuality caste system. The racial apartheid adopted by southern state legislatures and upheld in *Plessy* was very different from the new institution suggested in Baker and adopted by the Vermont legislature. Similarly, it is greatly unfair to tag the civil union measure as "separate but equal."[189]
>
> Eskridge also situated
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> the Jim Crow laws in their larger historical context to show how they differ from the civil union law. The Thirteenth and Fourteenth Amendments required "free and equal treatment" of African Americans. But after Reconstruction, "southern states backslid, adopting laws and amending their constitutions to create the legal foundations for apartheid." The Supreme Court's decision in *Plessy* was "a betrayal of the goals of Reconstruction, . : . [It] ratified a regime that. took away rights from people of color."10 Eskridge contrasts this to Baker and. civil union. He says the civil union law "gives partners joined in civil union 8i variety of state-

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[188] Gregory Johnson, *Civil Unions, a Reappraisal*, 30 Vt. L. Rev. 891, 902 (2006).

[189] *Id*. (quoting Eskridge).

> supported rights and benefits that they did not have before.. the law was adopted." Eskridge concludes that "[s]ocially, politically, and constitutionally, Baker bears a closer kinship to *Brown v. Board of Education* than it does to *Plessy*.[190]

I'm a son of the segregated south. I was born in a segregated hospital in a segregated southern city, Washington, D.C.[191] I grew up in a segregated working class neighborhood in segregated Virginia,[192] and I went to an all-white nursery school, kindergarten and public elementary school. I first met a person of color at age four – not in Virginia, or the U.S., but in Dakar, East Pakistan (now Bangladesh).[193]

Until I was ten years old, it was a criminal offense in my home state for an African American person to marry a white person.[194] I didn't have an African-American classmate until junior high school. It was during the era of bussing. I followed the civil rights movement in the news as it happened and, later, I studied it. My heroes included Dr. Martin Luther King, Thurgood Marshall[195] and John Brown,[196] all of whom I studied in college as an American history major in Fredericksburg, Virginia, Robert E. Lee's base during the Civil War and site of two major battles in that war to end slavery. I attended law school at the University of Virginia – Mr. Jefferson's university, and an institution which fought integration fiercely.[197] That was long before I attended the University of Virginia; Thurgood Marshall's son was my law school

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[190] *Id*.

[191] *See generally* Michael Mello, *Ivon Stanley and James Adams' America: Vectors of Racism in Capital Punishment*, 43 Crim L. Bull. 636, 643-44 (2007); Michael Mello, "Confessions of a 9/12 Liberal: Defending the USA Patriot Act, the Iraq War, and Israel" (2007) (unpublished).

[192] Mello, Vectors, *supra*, at 643; *see generally, e.g.*, ALEXANDER LEIDHOLDT, STANDING BEFORE THE SHOUTING MOB: LENOIR CHAMBERS AND VIRGINIA'S MASSIVE RESISTANCE TO PUBLIC-SCHOOL INTEGRATION (1997); FRANCIS WILHOIT, THE POLITICS OF MASSIVE RESISTANCE 30-31, 77-78, 93-94, 109-112, 138, 144, 149-50, 166, 168-69, 171-73 (1973).

[193] My father was working for the CIA at the time.

[194] MICHAEL MELLO, LEGALIZING GAY MARRIAGE (2004) (discussing *Loving v. Virginia*).

[195] My first book was a love letter to Thurgood Marshall and William Brennan. *See* MICHAEL MELLO, AGAINST THE DEATH PENALTY (1996) [hereinafter AGAINST THE DEATH PENALTY].

[196] I discuss John Brown in MICHAEL MELLO, USA V. THEODORE JOHN KACZYNSKI 157-163 (1999).

[197] This sorry story was told brilliantly in SARAH PATTON BOYLE, THE DESEGREGATED HEART (1962).

classmate.

I grew up in Virginia during some of the worst days of massive resistance to *Brown v. Board of Education*. After law school I clerked for a federal appeals judge in Birmingham, Alabama.[198] After that, I represented death row prisoners – mostly African-Americans – in Florida.[199] I've lived in Vermont for nearly 20 years, but the south is still home. When my time up here is done, I'll go back home.

The southerner in me rankles at some New Englanders' Manichean view of southerners and Vermonters. In their stark worldview, all Vermont legislators who voted for civil unions in 2000 were enlightened and good, and all southern legislators who voted for Jim Crow laws decades previously were racist and bad. For too many smug, self-righteous, condescending New Englanders, all Jim Crow southerners were racists, bigots, primates, low-lives, KKK rejects, and cross and/or heretic burners.

This black-and-white caricature of Vermonters and southerners gives Vermonters too much credit and southerners too much blame. Real world people in both regions of America are more complicated than these facile stereotypes allow.

In the real world of southern politics during Jim Crow, some white southern politicians were more courageous than anyone in this room right now. I know: I clerked for one,[200] before he was murdered by a racist with a mailbomb.[201]

In the real world, some southern legislators who voted for Jim Crow laws genuinely thought that separation actually *benefitted* African Americans. Some were racists to their core. Some simply bended to the "political reality" of the times.

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[198] Michael Mello, *Ivon Stanley and James Adams' America: Vectors of Racism in Capital Punishment*, 43 Crim. L. Bull. 636 653-65 (2007).

[199] *Id*; Michael Mello, "*In The Years When Murder Wore the Mask of Law: Diary of a Capital Appeals Lawyer*, 34 Vt. L. Rev. 583 (2000).

[200] *Id*. at 653-58; *see also, e.g.*, MICHAEL MELLO, DEATHWORK (2002); MICHAEL MELLO, THE WRONG MAN: A TRUE STORY OF INNOCENCE ON DEATH ROW (2001); Mello, *Diary*, *supra*.

[201] *Id*.

In the real world of Vermont in 2000, some legislators voted for civil unions because they genuinely wanted to advance marital equality for same-sex couples.[202] Some legislators used the *Baker* decision for cover.[203] Some legislators voted for civil unions as a more palatable alternative to judicially-mandated gay marriage.[204] Some legislators were bigots and panderers and demagogues.[205] Yes, Vermont, you have them, too.

In the real world, people usually act with mixed motives. Legislators are people. Focusing on the motives of those humans who happen to be legislators – as the Eskridge and Johnson analysis seems to do – strikes me as problematic and ultimately futile. If you do choose to go that way, please drill deeper than facile caricatures in which all southern legislators are bad and all Vermont legislators are pure of heart. Let's have a little recognition of our "common humanity" here.

A more profitable enterprise would be to study the *effects* of civil unions as a substitute for marriage. This is precisely what the Massachusetts court did in *Goodridge II*. The court recognized that the good intentions of civil unions legislators were beside the point. The Commission should do so as well.

I believe Professor Greg Johnson when he says that civil unions don't make *him* feel like a second-class citizen. I am honestly happy that civil unions don't make him feel diminished in any way. He's one of my favorite faculty colleagues, and I consider him a cherished friend.

But the Commission has already heard that other same-sex couples in Vermont *do* feel relegated to second-class matrimonial citizenship by civil unions. Media reports suggest that this Commission has already heard testimony that civil unions make many Vermont couples *feel* like

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[202] *Id*.

[203] *Id*.

[204] *Id*.

[205] *Id*.

second-class citizens.[206] They are the *real* experts.

As a way of framing the issue presented, consider a question asked by a hypothetical child of a Vermont couple joined by civil union. Our hypothetical child asks her mommies: "Why aren't you married, like parents of my friends at school are married?" A candid answer from our hypothetical same-sex parents would be troubling. Such as an answer would have to include the fact that the civil unions statute explicitly forbids same-sex marriage. And that the reason for the law's exclusion—the *only* reason for the law's exclusion—was the "political reality" of homophobia in Vermont in 2000.

The reality is that *some* same-sex couples in Vermont are perfectly content with civil unions. Some gay and lesbian Vermonters who – like Professor Johnson – are trained in the law and in the history of the same-sex unions controversy in Vermont do feel that civil unions are better than marriage. Others feel that only marriage is equal to marriage. Adults, gay or straight, can understand the counterintuitive notion that separate can be truly be equal.

My concern is for the *children* of same-sex couples in Vermont. Children don't think like law professors. Children don't think like lawyers. Children don't appreciate the nuances of history or culture or "political reality."

The civil rights briefs filed in *Goodridge II* demonstrate that the *effect* of civil unions is to mark same-sex couples with a badge of inferiority, regardless of the good intentions of the supporters of the statute in 2000. The Massachusetts court agreed in *Goodridge II*. I think they make a compelling case, and I hope to reinforce it in a moment.

In the aftermath of *Baker*, a number of people – including me – stated that the civil unions option was inappropriate because it would create a separate-but-equal system of marriage. There was, however, little exploration of precisely what was wrong with separate-but-equal. My intent in this section is to nail down (1) exactly *why* the separate-but-equal doctrine was struck

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[206] *E.g.*, Nancy Remsen, *Gay Marriage Supporters Say Civil Unions Fall Short*, Burl. Free Press, Oct. 11, 2007; Daniel Barlow, *Gay Marriage Commission [sic] Begins Public Hearings*, Times Argus, Oct. 12, 2007; Nathan Burgers, *Gay Marriage Forum Held: Locals Speak Out in Support of Idea*, Oct. 18, 2007.

down by the U.S. Supreme Court in *Brown v. Board of Education* and post-*Brown* cases, and (2) why the reasoning of *Brown* and its progeny apply with full force to Vermont's civil unions.

It seems to me that the only true remedy for the constitutional right recognized in *Baker v. State* is to grant same-sex couples the right to marry. The alternative is some form of separate-but-equal marriage substitute. But, as I thought we'd learned in 1954 in *Brown v. Board of Education*,[207] separate is inherently unequal—and unmistakably inferior—when it comes to fundamental human rights like education (and civil marriage), and even when it comes to such mundane things as eating a cheeseburger and drinking a Coke at a Woolworth lunch counter in North Carolina or riding a cross-town bus in Montgomery, Alabama, or staying at a motel in Atlanta.

1. Badges of Inferiority, Intended and Unintended: From *Plessy* to *Brown*

In 1896, in the infamous decision *Plessy v. Ferguson*, the Supreme Court upheld the constitutionality of separate-but-equal facilities for African Americans and whites. Homer Plessy, who was one-eighth African American and who was a resident of New Orleans had been forced *by law* to ride in the segregated section of a train coach. With a lone dissenter, the Supreme Court Justices unanimously upheld the right of the southern government to segregate Mr. Plessy, solely because of his race, from the white passengers in that train. The Supreme Court explained: "If one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane."[208]

Only John Marshall Harlan (the first Justice Harlan) dissented in Homer Plessy's case. Harlan wrote: "Our Constitution is color-blind, and neither knows nor tolerates classes of citizens . . . . [The] thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead anyone, nor atone for the wrong this day done."[209] That day lasted for more than

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[207] Brown v. Board of Education, 347 U.S. 483 (1954).

[208] *Plessy, supra*.

[209] *Id.*

half a century—and *Plessy v. Ferguson* provided the rigid segregation in the south during the tragic era of Jim Crow, the era of the tragic fiction that facilities racially segregated *by law* can ever be "equal."

Plessy remained the law of the land for nearly six decades, until 1954 and *Brown v. Board of Education*, when the Court decided that segregation imposes on African Americans a badge of inferiority. In its first brief to the Court arguing that separate-but-equal was an oxymoron, the United States government (as Anthony Lewis reminded us)[210] asserted that "the curtain which fences Negroes off from other diners [in railroad dining cars] exposes, naked and unadorned, the caste system which segregation manifests and fosters. A Negro can obtain service only by accepting, or appearing to accept, under the very eyes of his fellow passengers, white and colored, the caste system which segregation signifies. . . . *This [is a] message of humiliation."*[211]

This "message of humiliation," this badge of inferiority, was exactly what was wrong with the separate-but-equal doctrine, according to the Court in *Brown*. The unanimous opinion in *Brown* explained that segregation is *especially hurtful "when it has the sanction of the law*; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group."[212]

2. "Separate" Is "Inherently Unequal"

The *Plessy v. Ferguson* Court had said that "the underlying fallacy" of the African American plaintiff's complaint was his "assumption that the enforced separation of the two races stamps the colored race with a *badge of inferiority*. If this be so, it is not by reason of anything

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[210] Anthony Lewis, *"Imposing On Them a Badge of Inferiority*," N.Y. Times, Jan. 22, 2000 (emphasis added).

[211] *Id.*

[212] *Brown, supra*.

wrong in the act, but solely because the colored race chooses to put that construction on it."[213] In other words, racial minorities were simply being hypersensitive in inferring inferiority from the white majority's choice to segregate African Americans from the race of their former masters and owners.

The reply to *Plessy*'s disingenuous reasoning is simple: Even a dog knows the difference between being tripped over and being kicked. The unanimous *Brown* Court put it more artfully: "In the field of public education the doctrine of 'separate-but-equal' has no place. *Separate* educational facilities are *inherently unequal*."[214]

Denying committed same-sex couples the right to civil marriage sends them the same message of humiliation and second-class citizenship to gays and lesbians. It stamps same-sex couples with an unmistakable badge of inferiority. The *New Republic* was quite right that any civil unions regime would be nothing more than separate-but-equal treatment of an unpopular minority: "To grant homosexuals all the substance of marriage, while denying them the institution, is in some ways, a purer form of bigotry than denying them any rights at all. It is to devise a pseudo-institution to both erase inequality and perpetuate it . . . . There is in fact no argument for a civil unions compromise except that the maintenance of stigma is an important social value—that if homosexuals are finally allowed on the marriage bus, they should still be required to sit in the back. . . . Equality is equality. Marriage is marriage."[215] The Massachusetts court in *Goodridge II* agreed.

VLS Professor Gil Kujovich has argued that the *Brown v. Board of Education* invalidation of separate-but-equal is distinguishable from the case at hand, because *Brown* was a school case and this is a civil marriage case. This argument is breathtakingly ahistorical. It ignores the entire—and successful—post-*Brown* history of the civil rights movement to

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[213] *Plessy, supra* (emphasis added).

[214] *Brown, supra* (emphasis added).

[215] Editorial, *Separate-but-equal*, the New Republic, January 2000.

desegregate the whites-only south.

Brown was an education case, but it was not limited to that factual context. The Supreme Court, the Fifth Circuit and Congress have applied *Brown* to everything from segregated lunch counters in North Carolina to segregated libraries in Maryland to segregated busses in Alabama.[216] *Brown* wasn't just a legalistic holding: It was a statement of human worth and morality that transcended the narrow dispute before the Court. The whites-only south was not limited to schools, and neither was the reach of *Brown*. *Brown's* principle that separate *meant* unequal was applied to everything from busses to restaurants to bathrooms to water fountains.[217]

Take the laws mandating segregated busses in Montgomery, Alabama for example. During the Montgomery bus boycott[218] led by Martin Luther King, J., in 1955 and 1956, the law requiring segregated public transportation in Alabama was challenged in court.[219] Lawyers for the segregationists argued that *Brown*'s ban on separate-but-equal only applied to schools, not busses.[220] Lawyers for the desegregationists argued that it did.[221]

The case attacking Montgomery's segregated busses—called *Browder v. Gayle*—was heard by a panel of three federal judges. The court decided that, under *Brown*, a separate-but-equal system for transportation also was unconstitutional: "In their private affairs, in the conduct of their private businesses, it is clear that the people themselves have the liberty to select their own associates and the persons with whom they will do business, unimpaired by the Fourteenth

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[216] RICHARD KLUGER, SIMPLE JUSTICE (1975).

[217] *Id*.

[218] *See generally*, TAYLOR BRANCH, PARTING THE WATERS (1988). Rosa Parks was arrested on December 1, 1955. *Id*. at 128. Although the precise moment "marking the origins of the Montgomery bus boycott would become hotly contested ground to future generations of civil rights historians," *id*. at 132 n.*, the first moves to organize the boycott began shortly after Ms. Parks' arrest.

[219] KLUGER, *supra*.

[220] *Id*.

[221] *Id*.

Amendment."[222]

The court amplified: "There is, however, a difference, a constitutional difference, between voluntary adherence to custom and the perpetuation and enforcement of that custom by law."[223] Judge Rives observed that the separate-but-equal concept, on which *Plessy v. Ferguson* was based, "had its birth prior to the adoption of the Fourteenth Amendment in the decision of a Massachusetts State Court relating to public schools."[224] "The separate-but-equal doctrine," Rives continued, "was repudiated in the area where it first developed, *i.e.*, in the field of public education.

"We cannot in good conscience perform our duty as judges," Rives concluded, "by blindly following the precedent of *Plessy v. Ferguson* when . . . we think that *Plessy v. Ferguson* has been impliedly, thought not explicitly, overruled."[225] We "hold that the statutes and ordinances requiring segregation of the white and colored races on the motor buses . . . violate the due process and equal protection of the law clauses of the Fourteenth Amendment to the Constitution of the United States."[226]

In 1960, in *Boynton v. Virginia*—my Virginia, again, I'm sorry to say—the Supreme Court outlawed segregation in interstate bus terminals.[227] In 1961, a challenge to segregation of bus and train terminals in Jackson, Mississippi reached the Supreme Court.[228] The Court's response was unsigned and blunt: "We have settled [in *Boynton*] beyond question that no state may require racial segregation of interstate or intrastate transportation facilities. The question is

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[222] JACK BASS, TAMING THE STORM 111 (1993) (quoting *Browder v. Gayle*).

[223] *Id.*

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] KLUGER, *supra*.

[228] KLUGER, *supra*.

no longer open; it is foreclosed as a litigible issue."[229]

And it wasn't only Jim Crow busses in Alabama, as any student of *Brown* should know. Richard Kluger—author of *Simple Justice*, the magnificent book about *Brown v. Board of Education*—noted that "it became almost immediately clear that *Brown* had in effect wiped out all forms of state-sanctioned segregation."[230] In the spring of 1955, the Fourth Circuit, following *Brown*, held that Baltimore, Maryland could no longer segregate its bathing beaches or public recreation facilities.[231] The Supreme Court affirmed the Fourth Circuit, "on the same day it reversed a Fifth Circuit opinion upholding separate-but-equal golf courses for Blacks in Atlanta. That year, courts in Michigan and Missouri cited *Brown* as authority for ending segregated housing at municipally run developments."[232]

In the dozen years after *Brown* was decided "the Warren Court handed down decision after decision that followed the path of *Brown*. Segregation was outlawed in public parks and recreation areas, on or at all interstate—and intrastate—commerce facilities waiting rooms and lunch counters as well as the carriers themselves, in libraries and courtrooms and the facilities of all public buildings, and in hotels, restaurants and other enterprises accommodating the public."[233]

Law professors complained that the Court seemed to be so casual about extending *Brown* beyond the school setting.[234]

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[229] RICHARD KLUGER, SIMPLE JUSTICE 750 (1975).

[230] *Id.*

[231] *Id.*

[232] *Id.*

[233] *Id.* at 750-51.

[234] Chief Justice Amestoy, in his commencement address at Vermont Law School, *see* Jeffrey Amestoy, *excerpts*, 6 Vermont Lawyer 2 (May 31, 2002), put it this way:

> I recently had a conversation with a very bright and talented young lawyer who told me she wanted to give up the practice of law. At least one of the reasons for her unhappiness was obvious when I asked her if there was a case she had handled where she *really cared* about the result. Although she could point to successful trials with obvious pride, she couldn't identify a single case to which she felt committed in the sense I meant:

that is – where one feels one's heart will break if justice is not done.

I have deliberately chosen to link the words "justice" and "heart." I do so because this is a class that – for reasons of history, timing, and place – has been witness to the extraordinary challenge of the application of law to matters of the heart. Whatever one's view of the legal merits of *Baker v. State,* it can surely be said that it represents fallible human institutions confronting profoundly human issues.

Perhaps the most widely quoted phrase in the *Baker* opinion was its reference to "our common humanity." As used in *Baker*, that phrase has been understood – as it should be – to speak to the recognition of what is decent, humane, and worthy of protection in human relationships. But there is another sense I intended to convey in choosing those words.

> The past provides many instances where the law refused to see a human being when it should have. The future may provide instances where the law will be asked to see a human being when it should not. The challenge for future generations will be to define what is essentially human.

When I speak of defining the essence of what makes us human, I mean it in a fundamental sense – for judges will be asked the most basic of questions: What does being human mean?

I do not minimize the difficulty of deciding controversies like those raised in *Baker*, but I believe the Judges this class produces will face fare more troubling questions. We are just now beginning to perceive the significance of issues *not* common to humanity.

We should be grateful, I suppose, that the first successful cloning of an adult mammal was of a sheep. The benign face of Dolly enables us, as a culture, to feel more at east with the enormously complex issues raised by cloning. As a society notorious for avoiding ethical questions, we might have been better served if the Scottish Biological Research Team has chosen to clone a wolf.

However clothed, if the prospect of replicating human beings does not prompt us to think deeply about the meaning of identity, family, nature, and the human essence, it is difficult to see what will.

In a recent issue of the *Berkeley Technology Law Journal*, the author asserts that patent applications could be tailored to seek patents on human-animal chimeras "assuming that the courts develop a suitable definition of what it means to be human." That is a sentence that ought to have stopped the author – it should stop us all.

What, then, of the judge? For as one law review author so naively put it: "the issue appears destined for *resolution* by the courts."

I find very striking that those most troubled by the potential consequences – find hope not in human reason, but human emotion. In Kevin Quido's essay "Human Cloning After Dolly: What sort of Creatures Might We Become," he writes: "the prospect of human cloning should exact some reckoning of our *common humanity*."

That "reckoning" will be fast upon us. At this point I reveal myself as one who mistrusts leaving the answer to the question "what is common to humanity?" entirely to the logic of the law. There are, I believe – acknowledging that may be entirely a product of an inexperienced judge – opinions that represent the expression of wisdom beyond the capacity of legal analysis to fully articulate that wisdom.

Brown v. Board of Education, for example, surely stands as one of the finest moments in the history of American law. Its contribution to the ideal of democracy cannot be overstated not withstanding some recent revisionist history. But as Judge Posner has observed: "Fixed star in our judicial firmament that it is, *Brown v. Board of Education*, cannot be shown to be correct as a matter of interpretation." Indeed, contemporaneous scholarly comment that focused on the legal justification for *Brown* found much to criticize in Chief Justice Warren's opinion.

What then are we to make of the fact – for fact I believe to be – that confronted with one of the most significant cases of the 20th century – Legal analysis was an incomplete tool with which to decide *Brown v. Board of Education*. If I had to explain how it came to be that Earl Warren reached a decision that application of consistent legal analysis does not fully support, I would offer this story from Richard Kluger's book *Simple Justice*:

Not long after coming to Washington – before *Brown* was handed down –

"How could the negative psychological effects of separate schools on student motivation to learn be invoked to justify the ending of Jim Crow busses, beaches, and golf courses"?, the professors asked.[235] The Court didn't care. It continued to broaden "the premise of *Brown* to hold that all forms of racial segregation were discriminatory and therefore humiliating and therefore a violation of equal protection."[236]

Thus, separate-but-equal is illegal even when applied to such prosaic and mundane matters as riding a bus or playing golf or swimming on a public beach or ordering lunch at a terminal lunch counter. One could argue, I suppose, that state-sanctioned civil marriage is distinguishable from state-sanctioned segregation of city busses. Indeed, they are: Marriage is far more important, and the badge of inferiority imposed on same-sex couples by separate-but-equal civil unions is far more dehumanizing, degrading and humiliating. This Commission has already heard testimony by same-sex couples bearing witness to how civil unions make them *feel* like

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> Warren went to visit Civil War monuments in Virginia. He was accompanied by a court employee – an Afro-American assigned to drive the Chief Justice. At the end of the day, they pulled up to an Inn where Warren had made arrangements to stay. When Warren came out of the Inn the next morning to resume his four, he saw that the driver unable to find lodging in a segregated town had spent the night in the car.
>
> Chief Justice Warren had failed to realize that – in the heart of Civil War country – there was no room for a fellow court employee. In recounting the story many years later, Warren still remembered his reaction: He was *ashamed*. He was *ashamed*.
>
> One January evening I was giving my daughter Katie–then–a ride home from ice skating. It was a could winter's evening in Vermont–the sky already filling with stars.
>
> And Katie looking out at the sky was trying to ask me a question.
>
> But I was preoccupied. I had turned on the car radio to get the latest news. The report that evening was not about another school shooting or mideast violence. Instead across the airways came form Capetown the New Year's message of Archbishop Desmond Tutu. The clarity–the moral force of that voice–was as vivid as the stars against the Vermont sky. And this is what I heard:
>
> > Human beings are actually created for the transcendent, for the sublime, for the beautiful, for the truthful...all of us are given the task of trying to make the world a little more hospitable to these beautiful things–to love, to compassion, to caring, to sharing just to being human.
>
> Now I *was* listening and Katie asked her question: "Dad, why is there a rule that your wish will come true only if you wish upon the first star you see? Why can't you wish upon the second star?"
>
> That's a pretty good question for a 7 year old to ask. It's even better question for a lawyer to ask. I hope you'll ask it. And more than that, I hope you answers come not just for the law that fills your head, but from a heart that trusts "the emotional experience of deep wisdom beyond reason's power to fully articulate it."

[235] K LUGER, *supra* at 750.

[236] *Id.*

second-class citizens.

The bus and lunch counter segregation cases are germane to the matter at hand even beyond the simple historical point they demonstrate about *Brown*'s extension beyond the school context. Governor Dean, and many Vermonters, found same-sex marriage "uncomfortable" (as our Governor put it).[237] But, in the 1950s and 1960s, many southern whites found it just as "uncomfortable" to sit beside an African American person at a Greyhound lunch counter or on a bus. The courts correctly held that such "uncomfortableness" is not a legally or morally sufficient reason for separate-but-equal segregation. And, today, the vast majority of southern whites no longer feel uncomfortable about sharing pubic accommodation with African American people. They just got used to it—as most Vermonters would, in time, get used to the idea and reality of same-sex marriages in our midst.

Segregated buses were unlawful because they were required *by law* to be segregated, and because that *law* stamped African American riders with a badge of inferiority. As Dr. King's Montgomery bus boycott proved, however, segregated buses weren't the only transportation in town. African Americans wishing for integrated travel were free to arrange their own, by private means. By contrast, the State of Vermont has an exclusive monopoly on the issuance of civil marriage licenses: Unlike the citizens of Montgomery, Alabama, for same-sex couples in Vermont, the state is the only bus in town. And that bus is segregated: Ever after civil unions, heterosexual couples ride in the front, same-sex couples ride in the back. The reason—the *only* reason—for the separate-but-equal treatment was the "political reality" of 2000. That marks Vermont same-sex couples with a badge of inferiority.[238]

Lawyers are masters at drawing distinctions. But, if the basic principle of *Brown*—that separate is inherently unequal—applies to Rosa Parks' right to sit in the front of a dusty cross-

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[237] Moats, *supra*.

[238] *Brown* of course doesn't preclude things like separate-but-equal bathrooms for men and women—because separate washrooms do not imply a badge of inferiority. But separate marriage substitutes do indeed stamp same-sex couples with a badge of inferiority.

town bus in Montgomery, Alabama, then it seems to me that the only thing equal to marriage is marriage.[239]

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[239] Brent Staples wrote an eloquent op ed piece in the *New York Times* on September 8, 1999 making the connection between the same-sex marriage issue of today and the civil rights struggles of yesterday:

> The civil rights movement had made spectacular gains in the courts—including Brown v. Board of Education—before Rosa Parks galvanized public opinion in a way that lawsuits had not. Ms. Parks became an emblematic figure when she was arrested in Montgomery, Ala., for refusing to sit in the "colored only" section of a bus. The sight of this dignified woman being denied the simplest courtesy because she was black crystallized the dehumanizing nature of segregation and rallied people against it.
>
> Racism began to wane as white Americans were introduced to members of the black minority whom they could identify as "just like us." A similar introduction is underway for gay Americans, but the realization that they are "just like us" has yet to sink in. When it finally does, the important transitional figures will include State Representative Steve May, a 27-year-old Republican from Arizona.
>
> Mr. May is a solid conservative who supports issues like vouchers and charter schools. He was raised a Mormon and recalls himself as the kid who "had to go out and bring in the wayward souls." He is also a former active-duty soldier and an Army reservist, whose record shows that he could have moved up swiftly and been given a command.
>
> But Mr. May is about to be hounded out of the Reserve for publicly admitting that he loves and shares his life with another man. This acknowledgment came last winter during a heated exchange in the Arizona Legislature over a bill that would have barred counties from offering domestic-partner benefits, stripping them from gay couples who currently enjoy them.
>
> Mr. May could have sat quietly, protecting his career. Instead he exposed the provision as bigoted and told the Arizona House: "It is an attack on my family, an attack on my freedom. . . . My gay tax dollars are the same as your straight tax dollars. . . . I'm not asking for the right to marry, but I'd like to ask this Legislature to leave my family alone."
>
> When Rosa Parks declined to yield her seat on that bus, she was telling Alabama that she was not just a *colored* person, but a human being who deserved the respect and protection of the law. Mr. May's words in the Arizona House were similarly clarifying. fearful of a backlash, gay politicians rarely mention their mates in public—and shy away from speaking of them in terms that might disturb even constituents who know that they are gay. But by framing his argument in the context of "the family," Mr. May disarmed his bigoted colleagues and took the debate on same-sex unions exactly where it needed to go.
>
> When Mr. May's comments became public, the Army Reserve began an investigation that legal experts say will certainly end in discharge. Lieutenant May will then become a casualty of "don't ask, don't tell," which ended more than 1,100 military careers in 1998, on the grounds that homosexuals who reveal the fact are nor longer fit to serve.
>
> This is a staggering loss at a time when the armed services are canvassing strip malls and lowering entrance requirements to find personnel. By the time this policy is abandoned, thousands of talented Americans will have been lost to a purge that will come to be recognized as contrary to the public good and morally wrong.
>
> Republicans began the 1990's refusing campaign contributions from gay organizations and demonizing homosexuals for political gain. But in the race for 2000, the most prominent candidates are accepting the money and say that they would hire gay workers as long as they refrained from pressing "a gay agenda"—a code phrase for keeping quiet about issues of same-sex intimacy, up to and including marriage. The trouble with this approach is that legitimacy for same-sex unions is the heart of the matter. By denying that legitimacy, we declare gay love less valid than heterosexual love and gay people less human. We cut them off from the rituals of family and marriage that bind us together as a culture.
>
> The legislator who wished to revoke benefits from same-sex partners in Arizona viewed those partnerships as culturally alien and morally illegitimate. The military establishment may force Mr. May out of the service—despite an exemplary record—because his family consists of two men who are indistinguishable from their neighbors, except that they sleep together.
>
> This persecution finds a parallel in statutes that made it illegal for blacks and whites to get married up until 1967, when the Supreme Court declared the laws unconstitutional. The laws were based on the primitive belief that blacks and whites were set apart on the tree of life by God Himself. Interracial couples were initially seen as a threat to the social order and to the institution

Supporters of civil unions don't like the back-of-the-bus analogy. But it's actually a strong analog that shows precisely what's wrong with any version of steerage-class parallel system of marriage-like benefits to same-sex couples.

African American-only seats were generally equal to whites-only seats. The fare to get on the bus was the same. The bus itself was the same. The bus route was the same. The seats themselves were the same. The view might not be as good in the last row as in the first, but it's not much worse than the view from the third row or the fourth row or the fifth. A law that segregated African Americans in the front of the bus would be no less wrong—and no less unconstitutional—than the laws that required them to sit in the back of the bus.

Notwithstanding the fact that the African Americans-only part of the bus was *really equal* to the whites-only part of the bus, the segregation itself was constitutionally and morally wrong. It was wrong because the *legally mandated* segregation itself marked the segregated people with a badge of inferiority. It was the *law* that mandated the segregation.

3. Civil Unions: Separate and Unequal

I believe that any parallel matrimonial system of civil unions will, by its very existence, be separate—and therefore unequal—because it would implicitly mark same-sex couples with a badge of inferiority.[240] However, the civil unions bill enacted into law contained language making explicit the second-class matrimonial citizenship status of same-sex couples.[241] The bill said that "civil marriage" in Vermont "consists of a union between a man and a woman."[242] The bill also distinguished between the terminology for the rites and rituals that symbolize the two

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> of marriage. Over time, the culture began to discard the filter of race, viewing the couples as "just like the rest of us." The same process will probably work out for same-sex couples—but only after an extended battle. When the matter is settled, historians will look back at people like Steve May, who declined to go quietly to the back of the American bus.

Brent Staples, *Why Same-sex Marriage is the Crucial Issue*, N.Y. Times, Sept. 8, 1999.

[240] M ELLO, MARRIAGE, *supra*.

[241] *Id*.

[242] Jack Hoffman, *Panel Affirms Marriage Tradition*, Rutland Herald, March 1, 2000.

classes of unions, heterosexual and same-sex. Marriages of heterosexuals are "solemnized." Unions of homosexuals would be "certified" by judges or clergy members.[243]

Even the comprehensive civil unions scheme signed into law is not be truly "equal" to marriage. Civil unions are unequal to marriage in terms of tangible and intangible benefits. William Eskridge has noted that "in at least one sense, civil unions flunk the separate-but-equal rule . . . that is their lack of interstate portability."[244] Further, civil unions don't count as "marriages" for purposes of federal law (tax law, Social Security law, immigration law, etc.)[245]

The intangible benefits have to do with "a sense of belonging, a sense of being part of the community."[246] The *Valley News* newspaper recognized that marriage "confers a certain community status as defined by society. Establishing a parallel institution is a way to create an instrument for providing homosexual couples with everything but the social status that other couples enjoy."[247]

It is these intangibles (which aren't so intangible to the people who are denied them based on sexual orientation) that make me so uncomfortable with marriage substitutes such as civil unions.[248] Again, the only reason for the creation of a complicated parallel system of civil

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[243] Adam Lisberg, *Panel Oks Marriage Substitute*, Burlington Free Press, March 2, 2000.

[244] ESKRIDGE, CIVIL UNIONS, *supra*, at 136-37.

[245] *Id.* at 137-38.

[246] Jack Hoffman, *Partnership and Marriage Won't Ever Be Equal*, Rutland Herald, Jan. 16, 2000.

[247] Editorial, *Our Common Humanity*, Valley News, Jan. 26, 1999.

The issue of "portability"/full faith and credit is worth a footnote. The possible lack of portability of Vermont same sex marriages is not a reason not to recognize such marriages here. We are talking about the law of *Vermont*. I don't think we should resurrect *Plessy* in the 21st Century because other states might be bigoted against gays.

And Vermont hasn't in the past. When much of the south outlawed interracial marriages, did Vermont law forbid interracial marriage in Vermont because such marriages might not be "portable"? Did Vermont enact a racist marriage law because of fears racist states might not give full faith and credit—as the Constitution requires them to give—to our non-racist marriage laws? Vermont did not, because Vermont says it's different. Now is the time to prove it.

[248] The *Valley News* editorialized that "if the legislature believes that it is worth its time to make [an] extraordinary effort to create a parallel institution, would it not thereby concede that it is creating an inferior institution, not just a separate one?" *See* Editorial, *Our Common Humanity*, Valley News, Dec. 26, 1999.

unions—rather than simply opening up marriage to include same-sex couples—was the "political reality" of homophobia in 2000. This marks same-sex couples with a badge of inferiority. As the members of the House Judiciary Committee made clear, the only reason they opted for the cumbersome civil unions option, rather than choosing the more straightforward option of same-sex marriage was the "political reality."[249] That "political reality" is the homophobia that swept the state in the wake of the *Baker* decision.[250]

Eileen McNamara, a *Boston Globe* columnist, got it exactly right: Civil unions "proposals are no more than a political dodge, an unconscionable sop to bigots who will tolerate homosexuality only if it can be segregated in some parallel universe. But gay and lesbian people do not live in a parallel universe. They live in this one."[251] "Why," McNamara wrote, "should our brothers, sisters, aunts, uncles, sons and daughters be relegated to faux marriages simply to appease those who can live more easily than they can with discomfort."[252]

A gay man, writing in a letter to the editor of the *Rutland Herald*, made clear that the badge of inferiority is inherent in civil unions: "Separate-but-equal is a doctrine built on fear. It's purpose is to institutionalize and ensure the simple reality that 'separate' remains unequal; otherwise, no justification exists for 'separate' at all."[253] The letter was written and published in 2000.

4. *Loving*

As I've said, I'm a southerner. I grew up in Virginia, a state that, until the late '60s—that's the *19*60s—outlawed interracial marriages. The rhetoric in support of that particular piece of racist legislation—and the general culture of tolerance for racism that made such a law

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[249] M ELLO, MARRIAGE, *supra*.

[250] *Id*.

[251] Eileen McNamara, *Marriage Lite Won't Cut It*, Rutland Herald, Dec. 23, 1999.

[252] *Id.*

[253] Letter to the Editor, Rutland Herald, March 9, 2000.

possible—had an eerie resonance to me in 2000, as I listened to the homophobic rhetoric in favor of denying gays and lesbians the right to civil marriage. I've heard it all before: Marriage is a sacred institution; interracial marriage violates the Bible and God's will.

During the first 10 years of my life, interracial marriage was against the law—it was a criminal offense—where I lived. It was a Virginia case, *Loving v. Virginia*,[254] that the Supreme Court used as a vehicle to strike down such laws evil.

In June 1958, Richard Loving, a white man, and Mildred Jeter, an African-American woman, were married in the District of Columbia, where interracial marriages were legal. Soon after their wedding, the Lovings, who had both been residents of Virginia, returned to Virginia and set up their household in Caroline County.[255] A state grand jury indicted the Lovings for violating Virginia's ban on interracial marriages. The Lovings "pleaded guilty to the charge and were sentenced to one year in prison; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the state and not return to Virginia for 25 years."[256] The judge's opinion explained:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[257]

Following their guilty plea, and pursuant to their sentence, the Lovings left Virginia. They moved to DC and sued to invalidate Virginia's interracial marriage laws.[258]

In the U.S. Supreme Court, the Assistant Attorney General for the Commonwealth of Virginia, R.D. McIlwaine III, of Richmond, argued:

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[254] Loving v. Virginia, 388 U.S. 1 (1967).

[255] *Id.*

[256] *Id.*

[257] *Id.* (quoting trial court).

[258] *Id.*

McIlwaine: We start with the proposition, on this connection, that it is the family which constitutes the structural element of society; and that marriage is the legal basis upon which families are formed. Consequently, this Court has held, in numerous decisions over the years, that society is structured on the institution of marriage; that it has more to do with the welfare and civilizations of a people than any other institutions; and that out of the fruits of marriage spring relationships and responsibilities with which the state is necessarily required to deal. Text writers and judicial writers agree that the state has a natural, direct, and vital interest in maximizing the number of successful marriages which lead to stable homes and families and in minimizing those which do not.

It is clear, from the most recent available evidence on the psycho-sociological aspect of this question that intermarried families are subjected to much greater pressures and problems than are those of the intramarried, and that the state's prohibition of interracial marriage, for this reason, stands on the same footing as the prohibition of polygamous marriage, or incestuous marriage, or the prescription of minimum ages at which people may marry, and the prevention of the marriage of people who are mentally incompetent.

[Chief Justice Earl] Warren: There are people who have the same feeling about interreligious marriages. But because that may be true, would you think that the state could prohibit people from having interreligious marriages?

McIlwaine: I think that the evidence in support of the prohibition of interracial marriages is stronger than that for the prohibition of interreligious marriages; but I think that . . .

Warren: How can you say that?

McIlwaine: Well, we say that principally . . .

Warren: Because you believe that?

McIlwaine: No, sir. We say it principally on the basis of the authority which we have cited in our brief.[259]

Bernard Cohen, arguing as a friend-of-the-Court, refocused the Justices on the human dimensions of the case before them:

If the framers had the intent to exclude antimiscegenation statutes, it would have taken but a single phrase in the Fourteenth Amendment to say, "excluding antimiscegenation statutes." The language was broad. The language was sweeping. The language meant to include equal protection for Negroes. That was at the very heart of it, and that equal protection included the right to marry, as any other human being had the right to marry, subject to only the same limitations.

And that is the right of Richard and Mildred Loving to wake up in the morning, or to go to sleep at night, knowing that the sheriff will not be knocking on their door or shining a light in their face in the privacy of their bedroom, for

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[259] MAY IT PLEASE THE COURT 282-83 (Peter Irons and Stephanie Guitton eds 1993) (quoting oral arguments in *Loving v. Virginia*).

"illicit cohabitation."

The Lovings have the right to go to sleep at night, knowing that should they not awake in the morning their children would have the right to inherit from them, under intestacy. They have the right to be secure in knowing that if they go to sleep and do not wake in the morning, that one of them, a survivor of them, has the right to Social Security benefits. All of these are denied to them.

The enormity of the injustices involved under this statute merely serves as indicia of how the civil liabilities amount to a denial of due process to the individuals involved. As I started to say before, no matter how we articulate this, no matter which theory of the due process clause, or which emphasis we attach to it, no one can articulate it better than Richard Loving, when he said to me: "Mr. Cohen, tell the Court I love my wife, and it is just unfair that I can't live with her in Virginia." I think this very simple layman has a concept of fundamental fairness, and ordered liberty, that he can articulate as a bricklayer, that we hope this Court has set out time and time again in its decisions on the due process clause.[260]

Peter Irons described the outcome in *Loving v. Virginia*:

On June 2nd, 1967, Richard and Mildred Loving celebrated their ninth wedding anniversary. Ten days later, the Supreme Court added a present. The Lovings—and their kids—could sleep without any worries that Sheriff Brooks would drag them out of bed.

Like the *Brown [v. Board of Education]* case, *Loving versus Virginia* was unanimous. And like *Brown*, Chief Justice Warren spoke for the Court. His opinion was short and blunt. Virginia's law against racially mixed marriages violated two provisions of the Fourteenth Amendment. The equal protection clause bans racial laws that do not serve a "permissible state objective." The state's only purpose, Warren said, was "to maintain White Supremacy." The law also violated the due process clause, which protects the right of liberty. That right includes the "fundamental freedom" to marry, without restriction on race.

The Lovings were thrilled with their anniversary present. "I feel free now," Mildred said. "It was a great burden." Rich was relieved. "It's hard to believe. Now I can put my arm around my wife in Virginia."

Racial attitudes change slowly, but they have changed with the law. Fifty years ago, nine out of ten Americans opposed mixed marriages. Recent polls show only one in four are still opposed, most of them older. There are now a million interracial couples in the United States, including Supreme Court justice Clarence Thomas and his wife.

Rich loving died in 1975, but Mildred still lives in the white cinderblock house he built. She still meets some hostile people, but attitudes, she says, have really changed. "The Old South is going away." Sheriff Brooks is one person whose attitude hasn't changed. "I'm from the old school," he says, "I still think the law should be on the books." Rich Loving had this advice for his kids about who to marry: "I'd leave it up to them, let them decide for themselves." His daughter Peggy married a man of mixed race. She's proud of both her parents for the stand they took. Thanks to the Supreme Court, Peggy and her family don't

[260] *Id.* at 285.

have to worry about Sheriff Brooks any more.[261]

2007 marks the 40th anniversary of the decision in *Loving v. Virginia*. At a commemoration of that milestone last summer, "Mildred Loving joined many civil rights organizations when she threw her support behind gay marriage."[262] Mildred Loving explained: "I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have the freedom to marry."[263]

The arguments made in favor of the Virginia ban on interracial marriage were eerily similar to the arguments in 2000 in favor of banning same-sex marriage or civil unions. Susan Murray, one of the lead lawyers in *Baker*, testified before the House Judiciary Committee that interracial marriage had been called "unnatural," citing "a quotation from a U.S. Senator who opposed interracial marriage 'simply because natural instinct revolts as it is wrong.' And she said a U.S. Representative from Georgia warned that interracial marriage, 'necessarily involves degradation' of traditional marriage."[264]

Some have suggested that civil unions are not materially different from civil marriage, that it's only a label.[265] But when *the law* does the labeling, labels matter. During the oral

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[261] *Id.*

[262] Editorial, Washington Post, *Gay Marriage*, Valley News, July 9, 2007.

[263] *Id.* (quoting Mildred Loving).

[264] Jack Hoffman, *Gay Marriage Lawyer Makes Emotional Plea*, Rutland Herald, Feb. 5, 2000.

[265] Dennis O'Brien argued in a newspaper op ed piece that the separate-but-equal principle of *Brown* is not apposite to the present debate because civil unions are "not truly comparable to being made by law to attend a segregated school." Dennis O'Brien, *Let's Cool Rhetoric About Gay Marriage*, Rutland Herald, Dec. 30, 1999. But, as the post-*Brown* cases make clear, *Brown*'s rejection of separate-but-equal applied to the entire Jim Crow south, a south that segregated everything from water fountains to lunch counters; *Brown* did not only apply to schools.

Further, O'Brien suggested that because civil unions would be a minor form of "segregation" (same-sex couples would not be segregated from housing, schools, jobs, legal benefits, etc.), the only damage to homosexuals may be "to some measure of self-esteem or social acceptance." This reasoning echos the *Plessy v. Ferguson* Court's argument that any sense of inferiority Blacks may feel from being segregated on railroad cars was their own hypersensitivity.

But that was exactly the argument rejected in *Brown*: *Legally-sanctioned* segregation is unlawful when it imposes badges of inferiority. That is the unmistakable message of Vermont's rejection of same-sex marriage in favor of civil unions.

O'Brien was incorrect that gays who feel that civil unions were inferior simply have a self-esteem problem. The outpouring of homophobic sentiment in 2000 suggested that gays were not paranoid—they did have real

arguments in *Baker*, Chief Justice Amestoy "posed a hypothetical that all marriage might be thrown out and replaced with some kind of domestic partnership status."[266] Counsel for the same-sex couples rejected the idea, and Justice James Morse responded, "so the label is everything?"[267]

The label may not be "everything," but the label means a lot. Once again, the interracial marriage ban is instructive here. What if the U.S. Supreme Court in 1967, rather than ruling that whites and African Americans have the right to marry, ruled instead that states could create systems of civil unions for interracial couples while retaining marriage for white couples only?

We instinctively recoil from this suggestion, because today we instinctively know that racism is wrong. It wasn't always so. Throughout much of the south, when I was growing up there, racism was as accepted and acceptable as was homophobia in 2000 in Vermont.[268]

Sadly, while most Vermonters instinctively feel that racism is wrong, many Vermonters do not instinctively feel—in their gut—that prejudice based on sexual orientation is wrong.[269] Here, in the crucial year of the civil unions statute and today, it is acceptable in public discourse, for some Vermonters to call other Vermonters "abominations," "immoral," "evil," "crimes against nature."[270] If we substitute "Black" or "Jew" for "gay" in today's rhetoric, we'd call it hate speech and condemn it. Yet, it's acceptable to use such hate speech against gays and lesbians. Why is that, do you think?

I teach Vermont state constitutional law and federal constitutional law at Vermont Law School. It's sometimes hard to get students to see as relevant old constitutional chestnuts that

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enemies in Vermont. More importantly, gays feel inferior under a marriage substitute because *the law* is telling them they *are* inferior: They can ride the marriage bus, but only if they sit in the back.

[266] Ross Sneyd, *Who Gets to Marry?*, Valley News, Nov. 19, 1998.

[267] Ross Sneyd, AP, *From Vermont Justices, Many Questions*, Valley News, Nov. 19, 1998.

[268] M ELLO, MARRIAGE, *supra*.

[269] M ELLO, MARRIAGE, *supra*.

[270] *Id*.

seem like embarrassing remnants of our atavistic past. One of these is separate-but-equal. Now, all of a sudden, separate-but-equal has become the statutory law of Vermont, at least for a while, until the Vermont legislature or Vermont Supreme Court say in the gay context what the U.S. Supreme Court has said in the public school and virtually every context with respect to race: When separation is mandated *by law*, and when that separation constitutes a badge of inferiority, separate is inherently unequal.

5. Unlikely Heros

> All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority, and the segregated a false sense of inferiority.
>
> Martin Luther King, Jr., *Letter from Birmingham City Jail*[271]

Legislatures are not known for their courage in the face of highly vocal, mobilized and well-funded special interest groups, no matter how unrepresentative and bigoted those special interest groups might be.[272] And people like Randall Terry, as well as groups like Take It to the People, were nothing if not loud and intimidating.

Maybe it was possible for the Vermont legislature to resist such intimidation and do right in 2000.[273] But I doubted it.[274] Legislators are masters at compromise, and elected legislators felt a strong temptation to try to placate the homophobics and haters, even at the expense of the basic human rights and civil rights of Vermont's gay and lesbian people.[275] Legislatures are notoriously flaccid, and I expected that our legislature would listen to the lawyers and pass a statute giving gays and lesbians the minimum of rights required by the *Baker* decision.[276] This

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[271] King, *Letter From Birmingham City Jail*, *supra* at 293.

[272] MELLO, MARRIAGE, *supra*.

[273] *Id*.

[274] *Id*.

[275] MELLO, MARRIAGE, *supra*.

[276] *Id*.

they did. They resurrected the separate-but-equal doctrine, and they enacted a civil unions law that gave rights while unmistakably relegating same-sex couples to second class citizenship.[277] They did this, in part, because lawyers and law school professors told them that while separate-but-equal may not be a good thing, here is how you can get away with it anyway, maybe, depending on the judicial will and courage of the Vermont Supreme Court.[278]

Although I can think of few courageous *legislatures*, I can certainly think of courageous *legislators*.[279] As I wrote in my book, Representative David Deen, Senator Mark MacDonald, Representative William MacKinnon, Representative Thomas Little, Representative William Lippert, Representative Michael Kainen, and Senator Benjamin Ptashnick, are some homegrown example of heroism.[280] Given the unpopularity of same-sex unions—and the evidence demonstrated that many Vermonters polled disfavored even civil unions[281]—it would have taken moral and political courage for the Vermont legislature to enact, and for Governor Dean to sign, a same-sex marriage bill.

Governor Dean found the issue "uncomfortable," and he favored civil unions only when it was made clear that such unions were not "marriage." He might even have vetoed a same-sex marriage bill.

Governor Dean's tepid response to *Baker*—and his public determination to place the full power of his office behind opposition to same-sex marriage—reminded me of President Eisenhower's refusal to use the moral power of his office to increase public understanding of *Brown* and the justice of racial desegregation. Eisenhower decried "extremists on both sides"—thus equating the NAACP with the White Citizen's Councils—and opined: "Well, I can

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[277] *Id*.

[278] *Id*.

[279] *Id*.

[280] *Id*.

[281] Jack Hoffman, *Poll: Majority Say No to Same-Sex Benefits*, Rutland Herald, Jan. 25, 2000.

say what I have said so often: It is difficult through law and through force to change a man's heart."[282]

This missed the point. The point of erasing legally-mandated badges of inferiority isn't to erase prejudice in the hearts of men and women.[283] It's to erase prejudice *in the law*. It's to erase *the law's* sanctioning of such prejudice.[284]

The Vermont legislature doesn't have jurisdiction over the human heart. It does have jurisdiction over the sate's *law*. The discriminatory effects of civil unions are embedded in the *law*. The legislature has the jurisdiction and moral and legal duty to eliminate this discrimination in our *law*.

I also don't necessarily agree with the idea that changing the law has no effect on changing the hearts of people. History suggests that changing the law can begin the much harder process of transforming people's attitudes of bigotry and prejudice.[285] What President Eisenhower failed to understand post-*Brown*—and what Governor Dean failed to understand post-*Baker*—was that "the law itself and changes made under it give legitimacy to the social order that follows and brings about a change in attitudes. In Montgomery [Alabama], for example, white bus passengers changed their attitudes after they changed their seats."[286] After the *courts* forced them to change their seats.

"Burke Marshall understood the point very well. 'But laws *can* change the hearts of men,' he would say, stressing that it was the law that made change possible."[287] Howard Dean made clear that, when it comes to changing public hostility on same-sex *marriage*, the Vermont

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[282] Bass, *supra* at 150.

[283] M ELLO, MARRIAGE, *supra*.

[284] *Id*.

[285] *Id*.

[286] Bass, *supra* at 150.

[287] *Id.* (emphasis in original).

Supreme Court was on its own: It could expect no help from Vermont's chief executive.

Both the *Baker* majority opinion and Justice Johnson's dissent recognized explicitly that courts sometimes must make decisions that prove unpopular.[288] That's part of the job: to enforce the constitutional law without fear or favor. Reading Justice Johnson's dissent, I was reminded of a line from Holmes: "To think great thoughts you must be heroes as well as idealists."[289]

6. "All Deliberate Speed" and the "Myth of Time"

As mentioned earlier, the U.S. Supreme Court did not, in its landmark 1954 decision in *Brown v. Board of Education*, issue a decree ordering compliance with its holding that public school segregation was unconstitutional.[290] In fact, the Court asked the parties for another round of briefs and oral argument on the issue of implementation. Fully aware of the emotional impact its ruling would have in the south, and wishing to move cautiously and reasonably, the Justices directed the parties to address several questions: (a) should the Supreme Court issue a decree that Black children should forthwith be admitted to schools of their choice?; or (b) should the Supreme Court permit an effective gradual adjustment to be brought about from existing segregated systems not based on color distinctions?; (c) assuming the Court would permit gradual desegregation, should the Supreme Court itself formulate detailed decrees?; or (d) should the Court remand the cases to the lower courts with directions and, if so, what directions?[291]

Southerners saw the opportunity to evade *Brown*. The Arkansas Attorney General argued for the Justices to do what the Vermont justices did in *Baker*: to leave it to the legislature, to "the Congress for full implementation."[292] Southern legislatures were confident—and with good reason—that southern senators could filibuster any bill implementing *Brown*. South Carolina

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[288] M ELLO, MARRIAGE, *supra*.

[289] Quoted in Jack Bass, *supra* at 11.

[290] Kluger, *supra*.

[291] Kluger, *supra*.

[292] 23 USLW 2356-60 (April 19, 1955).

asked the Court to leave it to the lower courts, while conceding that there would be no integrated schools "perhaps not until 2015 or 2045."[293]

By contrast, Thurgood Marshall, arguing for the African American plaintiffs in *Brown*, urged the Court to issue firm instructions to the lower courts—including a "time limit,"[294] a fixed date, either September 1955 or September 1956,[295] or at any rate *some* fixed date by which time the lower courts must abolish segregation.

Marshall argued: "What is needed is a firm hand. . . . A District Court properly instructed by this Court will supply that firm hand. . . . If no time is set, they [the defendants] are going to argue in any event the same way they have argued here, which is nothing."[296] Marshall also called the Court's attention to the actual children in whose behalf the suits had been brought. Each of them had a "*personal and present right*" not to be discriminated against.[297]

The southerners won this round of *Brown*, of course. The Supreme Court did not fix a specific date for desegregation. The Court only ordered desegregation with "all deliberate speed," leaving the lower federal court judges to make *Brown* a reality, which they did, eventually but heroically.[298] But it took a long time. A *very* long time. I don't think that long time reduced the rancor; it might well have magnified it.[299]

Vermont Law School Professor Gil Kujovich praised the Vermont Supreme Court for moving slow on same-sex marriage.[300] I am troubled when heterosexuals argue that gays and

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[293] *Id.* at 3257.

[294] ARGUMENT (Chelsea House Publishers 1969) 439.

[295] ARGUMENT, *supra* at 393.

[296] *Id.* at 3526 and 3260.

[297] ARGUMENT, *supra* at 394 (emphasis added).

[298] MELLO, MARRIAGE, *supra*.

[299] *Id*.

[300] Gil Kujovich, *An Essay on the Passive Virtue of Baker v. State*, 25 VT. L. REV. 93 (2000).

lesbians ought to settle for less than the full equality enjoyed by we heteros. I am troubled for the same reason I distrusted whites in the south of my youth who argued that African Americans ought to wait. It's easy to exhort others to wait for the full rights of citizenship you have always enjoyed. In thinking about *Baker* and the legislative response to *Baker*, it is well for us to remember the words of Thurgood Marshall about the "personal and present"[301] rights of the African Americans in *Brown* not to be discriminated against.

That academics would urge gay and lesbian couples to go slow on same-sex marriage ought to surprise no one. As chronicled in Carol Polsgrove's important book *Divided Minds: Intellectuals and the Civil Rights Movement*,[302] white intellectuals, with a few exceptions, advised African Americans to be patient—even after the *Brown* decision and the 1964 Civil Rights Act and 1965 Voting Rights Act—rather than risk the anger and violence of white southerners. It took the lunchcounter sit-ins, and the publication of James Baldwin's essay *Letter from a Region of My Mind*, to give patronizing white academics a sense of African American anger.

It is also well to remember what was wrong with the *Plessy v. Ferguson* separate-but-equal doctrine struck down in *Brown*: the badge of inferiority the doctrine marked upon African Americans. The words of Martin Luther King, Jr. in *Letter From Birmingham City Jail*, bear emphasizing: "*All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority, and the segregated a false sense of inferiority.*"[303]

Dr. King, in this same letter, also wrote of what he called the "myth of time."[304] After noting that "I guess it is easy for those who have never felt the stinging darts of segregation to

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[301] ARGUMENT, *supra*.

[302] CAROL POLSGROVE, DIVIDED MINDS (2001).

[303] King, *Letter*, *supra* at 293 (emphasis added).

[304] *Id.* at 296.

say, 'Wait,'" King explained his rejection of the "myth of time," the idea that King was moving too fast towards desegregation, that if only he would be patient and wait, all would be well in the end.[305] King wrote that the "myth of time" grew "out of a tragic misconception of time. It is the strangely irrational notion that there is something in the very flow of time that will inevitably cure all ills. Actually, time is neutral. It can be used either destructively or constructively. I am coming to feel that the people of ill will have used time much more effectively than the people of good will. We will have come to repent in this generation not merely for the vitriolic words and actions of the bad people, but for the appalling silence of the good people."[306]

The *Baker* court's majority opinion included stirring words about "our common humanity." Yet that same court opinion seemed to leave open the possibility of a separate-but-equal system of civil unions. I have to wonder how long same-sex couples in Vermont will have to wait for their common humanity and ours to be fully recognized.[307]

Opponents of civil unions claimed that such unions are the first step down the road leading to marriage.[308] I hoped they were right in this prediction, but I doubted it. I opposed civil unions precisely because I did *not* believe they would end in marriage.[309]

Like the U.S. Supreme Court in *Brown I*, the Vermont Supreme Court in *Baker*

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[305] *Id.* at 296.

[306] *Id.* at 296.Beth Robinson, one of the lawyers for the plaintiffs *in Baker*, read to the House Judiciary Committee this passage from Dr. King's letter. *See* Jack Hoffman, *Gay Marriage Lawyer Makes Emotional Plea*, Rutland Herald, Feb. 5, 2000. She also quoted another passage from King's letter:

> I have almost reached the regrettable conclusion that the Negro's great stumbling block on the stride toward freedom is not the White Citizen's Counciler or the Ku Klux Klanner, but the white moderate who is more devoted to 'order' than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says, "I agree with you in the goal you seek, but I can't agree with your methods of direct action," who paternalistically feels that he can set the timetable for another man's freedom; who lives by the myth of time and who constantly advises the Negro to wait until a "more convenient season."

Id.

[307] M ELLO, MARRIAGE, *supra*.

[308] *Id*.

[309] *Id*.

recognized an important constitutional right. But, as there was a *Brown II* that mandated desegregation "with all deliberate speed," so will there be a follow-up litigation in the wake of the post-*Baker* civil unions statute.

Baker was truly a courageous decision, but the job is only partly complete.[310] To finish the task will require at least as much, if not more courage,[311] from our highest court.

7. Simple Equality and Simple Justice

> It's about time Vermonters took a stand and abolished this sort of behavior [*i.e.*, homosexuality].
>
> A letter to a Vermont newspaper (April 5, 2000)[312]

The *Baker* litigation was about *people*, Vermont people. Nina Beck, 44, and Stacy Jolles, 41, are raising a son, Seth, whom was one-month-old at the time of the *Baker* decision (the couple's first child, Noah, died soon after the *Baker* lawsuit was filed).[313] Lois Farnham, 51, has been with her partner, Holly Puterbaugh, for more than 27 years.[314] Stan Baker, 53, had been with his companion, Peter Harrington, for six years.

The question on the table in *Baker* was whether the State of Vermont would allow a despised minority in its midst equal access to the institution that is at the foundation of orderly family life: the right to civil marriage.[315] The alternative—a civil unions scheme—would stamp same-sex couples with the badge of inferiority that is at the core of what was wrong with the discredited doctrine of separate-but-equal.[316]

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[310] *Id*.

[311] *Id*.

[312] Letter to the Editor, Valley News, April 5, 2000.

[313] Heather Stephenson, *Couples Cheer Decision: "There's No Stopping Us*," Rutland Herald, Dec. 21, 1999.

[314] *Id.*

[315] M ELLO, MARRIAGE, *supra*.

[316] *Id*.

I have not always agreed with the Vermont Supreme Court's interpretations of the state constitution. I wasn't sure that *Brigham v. State*,[317] the court's school funding case, was an appropriate exercise in constitutional adjudication.[318] I wasn't sure about *Brigham* because the parties in *Brigham* were not in need of special judicial protection from the prejudices of the majority population: They were not despised for who they are. They were not discrete and insular minorities historically subject to discrimination within and without the legislative process.[319]

However, the court got it right in *Baker*, when it mattered the most. Notwithstanding the rhetoric of the court's critics, *Baker* was not a radical decision. Chief Justice Amestoy was no revolutionary.[320]

The Chief Justice is, however, a hero, an unlikely hero in the tradition of the Fifth Circuit and Federal District Court judges in the deep south who implemented *Brown v. Board of Education* in Alabama, Mississippi, Louisiana, Georgia, and the other states comprising the old Confederacy.[321] For all its shortcomings and missed opportunities, for all its invitation to disaster the long-discredited doctrine of separate-but-equal, the Chief Justice is a hero for his court's unanimous recognition of our common humanity.[322] And not just the Chief Justice.[323] The entire *Baker* court, all five of them.[324] They're all heros.[325]

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[317] Brigham v. State, 166 Vt. 246 (1997).

[318] M ELLO, MARRIAGE, *supra*.

[319] *Id*.

[320] *Id*.

[321] *See generally* JACK BASS, UNLIKELY HEROS (1981).

[322] *Id*.

[323] *Id*.

[324] *Id*.

[325] *Id*.

Those southern federal judges in the era of *Brown*—white men all, enforcing the civil rights of African Americans—paid a dear and terrible personal price for their determination to follow the law in the teeth of racial hatred.[326] Their lives were threatened, their families were shunned, their children were ostracized and ridiculed by their classmates at school—and by all the same sorts of people who believed, as fervently and as zealously as the homophobes of Vermont—that the Bible and God and nature decreed separation of the races.[327]

Many argue that same-sex couples ought to be happy with whatever the legislature (and the people of Vermont, a majority of which opposed even civil unions, according to the town meeting votes and polls) choose to give them. Gays and lesbians ought to wait for marriage until the people come to accept it.[328]

This argument also harkens me back to *Brown v. Board of Education*. As discussed above, the *Brown* Court did not order immediate compliance with its mandate; it only required states to desegregate their schools with "all deliberate speed." As we now know, "all deliberate speed" dragged on for decades. In the end, the judiciary had to tell the segregationists that enough was enough.[329]

I expect the same to be true of *Baker*. Many people (among them the editorial writers at the *Rutland Herald*)[330] saw the outpouring of opposition to same-sex marriages as a reason to settle for less than marital equality.

The opposite seems true to me.[331]

History teaches that people fear those different from themselves, and that people fear

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[326] MELLO, MARRIAGE, *supra*.

[327] *Id*.

[328] *Id*.

[329] *Id*.

[330] *E.g.*, Editorial, *The Political Dimension*, Rutland Herald, Feb. 4, 2000.

[331] MELLO, MARRIAGE, *supra*.

change. The inclusion of every group of outsiders, into the full benefits of American citizenship, has always come at a cost of social dislocation. For African Americans, America had to fight the bloodiest war in the nation's history, wait another century, and then fight another war in the courts and on the streets of places like Selma and Birmingham, Alabama. The Bible and the laws of God and nature were deployed to justify slavery, then the separate-but-equal doctrine, then Jim Crow. For women, it took the courts and Congress. Once again, the Bible and nature were trotted out to justify the unjustifiable.

Difference and change—so many people, even here in tolerant Vermont, seem to fear these things that perhaps I am being unfair to the opponents of same-sex marriage. Prejudice seems to be as much a part of some people as being gay is to other people. Part of me feels I ought to be more tolerant of other people's prejudices and bigotry.

Perhaps it's because I'm getting old, but I find myself less and less tolerant of racism, anti-Semitism, sexism and homophobia. I've been hearing the same lame excuses for them all my life, and I'm tired of it. Rosa Parks sat down because she was tired and who "responded to one who inquired about her tiredness with ungrammatical profundity: 'My feet is tired but my soul is rested.'"[332] I'm standing up because my soul is tired.

Homophobia is neither new nor surprising. What did surprise me—naively, in retrospect—was that Vermont was supposed to be different.[333] I heard the homophobia in grade school, junior high school, high school, college and law school in Virginia. I heard it when I worked in Alabama and practiced law in Florida. I didn't think I'd hear it here. Not in Vermont.

I must confess to an ineffable feeling of sadness in discovering, since the *Baker* decision, that Vermont is perhaps not really so different from the south—from my south—when it comes

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[332] Martin Luther King, Jr. *Letter From Birmingham City Jail* (1963) in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 302 (James Washington ed. 1986).

[333] M ELLO, MARRIAGE, *supra*.

to gays and lesbians.[334] In the years I've been living up here, I've listened to talk about how tolerant this place is, how very different it is from the bad old south of my childhood. I've heard, again and again, how Vermont was the first state to outlaw slavery; until the Civil War, Vermont remained the only state with a constitutional ban on slavery. Vermont was the first to elect an African American to its state legislature. Vermonters played heroic and crucial roles in the Civil War, particularly in the repulse of Pickett's charge on the third day of the battle of Gettysburg.

It's easy and safe to be smug and self-righteous and sanctimonious about race when in a state is as monochromatic as Vermont. Vermont "historically has had both the smallest number and smallest percentage of minority residents in the nation."[335] According to 1997 census date, Vermont's population is 98.4 white.[336]

Well, there *are* gay and lesbian people in Vermont. More than straight Vermonters might think. Some are out of the closet. I suspect that many are not and, given the outpouring of hate this state witnessed during 2000, it's easy to see why not.

As a Jew, I have encountered anti-Semitism in Vermont.[337] And many African Americans I know would take strong issue with the notion that Vermont—or at least that many Vermonters—are in fact as enlightened on matters of race as we might like to believe. A recent report found that "Vermont jails African-Americans at a higher rate than almost any state in the nation.[338] The Sentencing Project report found that "in five states African Americans are incarcerated at more than 10 times the rate of whites. Vermont, Iowa, Connecticut and

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[334] *Id*.

[335] David Gram, *Report Cites Racism in Vermont Schools*, Valley News, Feb. 6, 1999. Actually, Vermont is tied with Maine as the "whitest" state in the union. Diane Derby, "*Widespread" Racism is Found in Vermont Schools*, Rutland Herald, Feb. 6, 1999.

[336] Derby, "*Widespread"*, *supra*

[337] *See generally, e.g.*, Michael Mello, "Confessions," *supra.*

[338] Editorial, *Behind Bars*, Rutland Herald, Oct. 5, 2007.

Wisconsin are those five."[339]

Similarly, 2003 study determined that African Americans were arrested by police at higher rates than whites in Vermont.[340] The study, which was conducted by the Vermont Center for Justice Research, reinforced other studies which have shown African Americans are incarcerated in numbers disproportionately high compared to their percentage of the state population.[341] I have heard countless anecdotes about racism against African Americans in Vermont. One person of color recently told me (and I am paraphrasing here): "Vermont is more racist than the south, because Vermont is still in denial. At least the south is open and honest about its racism, and has tried to do something about it. The north—including Vermont—remains in denial about is own racism."

Actually, Vermont's reputation for tolerance had taken a pounding even before the homophobic reaction to *Baker*. In February 1999, ten months before the *Baker* decision was issued, the state advisory committee to the U.S. Commission on Civil Rights issued a report finding "widespread" racial harassment in Vermont's schools.[342] Equally significant, the report found Vermont in denial of this widespread racism.

This report bears quotation and emphasis. "*Racial harassment appears pervasive in and around the state's public schools,"*[343] the report said. "*Such harassment is "widespread and pervasive . . . and is a reflection of overall race relations in the state."*[344] And: "The elimination of this harassment is not a priority among school administrators, school boards, elected officials and state agencies charged with civil rights enforcement." Public schools were found to be

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[339] *Id*.

[340] David Mace, *Group Seeking to End Police Bias Remaining Mum*, Rutland Herald, July 9, 2003.

[341] *Id.*

[342] Diane Derby, *"Widespread" Racism Found in Vermont Schools*, Rutland Herald, Feb. 5, 1999.

[343] David Gram, AP, *Report Cites Racism in Vermont Schools*, Valley News, Feb. 6, 1999 (quoting report) (emphasis added).

[344] Derby, "*Widespread"*, *supra* (emphasis added).

unresponsive to reports of harassment—brought to their attention by parents of minority students. "The report faulted teachers, school administrators and government agencies for either not doing enough to combat racism and, in some cases even contributing to it," the Associated Press wrote.[345]

The report, and the investigation that produced it, were triggered by "a spate of incidents in Burlington and elsewhere, where minority students said they had been verbally taunted and sometimes physically attacked by white students," the Associated Press reported.[346] The report was also based on two community forums held in November 1977 in Burlington and Rutland. At the hearings, 18 parents and three students gave first-person accounts about racial harassment in Vermont's public schools.[347]

Those hearings "painted a picture of a system that was not only unresponsive to, but often in denial of, parents' complaints" of [348] racial harassment and assaults, according to Diane Derby of the Vermont Press Bureau. One parent was told by the school board that she was "overreacting" when she tried to meet with the board about her children being called "nigger" in class.[349]

"Another parent told of how her son, an African American, was subject to taunts and daily harassment from a student who would put trash on her son's cafeteria tray and then utter a racist remark about slavery."[350] Still another "mother testified that her daughter was called a whore, while her son came home crying and told her they were calling him racist names."[351] The

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[345] Gram, *Report, supra*.

[346] Gram, *Report, supra*.

[347] Derby, "*Widespread"*, *supra.*

[348] *Id.*

[349] *Id.*

[350] *Id.*

[351] *Id.*

mother of a Puerto-Rican boy told of how her son had been branded immediately as a gang member.[352] An adoptive mother of an African American girl "said she got a panicked call one day that her daughter had lice. 'The teacher claimed she had a different kind [of lice] than what they had seen before and it could infect the whole school. In reality her unusual lice was not lice at all but sand from the sand box. Their reaction was so out of proportion; my daughter is isolated and terrified.'"[353]

In light of the public disapproval of *Baker*—and the poisonous anti-gay rhetoric that swept across the state in 2000—it seems to me sadly significant that the Vermont civil rights report focused on the racist attitudes of Vermont's *school children*. These children presumably learned their racism at home, in their "traditional" heterosexual families. I wonder if it's the parents of these racist kids who are now disrespecting gays in general and *Baker* in particular.

It is also significant that the racial harassment report spoke to racists attitudes in *1999*. Not 1989 or 1979 or 1969 or 1959. 1*999*. The same year *Baker* was decided.

Of course, the 1999 report on racism in Vermont's schools—and the report's conclusion that the "*widespread and pervasive*" harassment in the schools "is a reflection of overall race relations in the state"[354]—did not appear in a vacuum. Notwithstanding Vermont's reputation for racial tolerance, shots were fired into the home of an African American clergyman in Irasburg in 1968.[355]

Then-Governor Phil Hoff—a distinguished member of this distinguished Commission—sparked a firestorm of opposition for his program to bring hundreds of African American children from Harlem to live with Vermonters.[356]

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[352] *Id.*

[353] Gram, *Report, supra*.

[354] Derby, *"Widespread"*, *supra*.

[355] Christopher Graff, Commentary, *Racism in Vermont is a Subtle Matter*, Rutland Herald, Jan. 17, 1999.

[356] *Id.*

Yet, it is the "Niggerhead" incident that is most germane. Chris Graff, Montpelier Bureau Chief for the Associated press, described what happened:

For a century a mountain and pond in Marshfield carried the name Niggerhead. In 1966 the U.S. Board of Geographical Names dropped the names from its maps and called on the state of Vermont to change the names, saying the term "nigger" was derogatory.

In 1967 the state Library Board, which had jurisdiction over place names, voted 6-1 that it "deemed no action necessary." The dissenter was James Holden, chief justice of the state Supreme Court.

A year later an aide to Hoff, who was then governor, appealed to the state Board of Civil Affairs/Rights and again the matter came before the state Library Board, which again refused to take action.

In 1970, a group called the "Committee to Abolish Niggerhead" formed and began orchestrating a campaign to change the names. Letters of support poured into the state, such as one from Shirley Files in the state archives in the secretary of state's office show this was an extremely contentious debate. One woman from Rutland wrote to the governor, "I suggest that the name be changed to 'White Trash.' This will show that white people do not feel sorry for themselves and perhaps the black people can take a lesson from this.

A woman in Brookfield noted the dictionary defined niggerhead as 'tussocks of grass sedge standing out of a swamp," referred to blacks as "them" and "foreigners" and wrote: "I just can't have sympathy for any people who are so sensitive they even got Kake Walk outlawed because they thought it was poking fun at them. What a sad world this would be if no one could stand being laughed at."

A sheet opposing the name change detailed the many definitions of niggerhead, including "to describe a milk can," and concluded: "In view of the very widespread and accepted use of this word throughout the English language, it is a question whether the current disenchantment with the word by a relative minority should outweigh its broad acceptance in American and British dictionaries."

Gov. Deane Davis was silent. In 1970 an aide to the governor wrote to a person seeking a change in the name that "as the matter was thoroughly reviewed in due process in the last several years, it is not felt timely to open the matter again."

The state Library Board met agin on the issue in April of 1971. But when Otis McRae, a black man and the leading advocate of the name change, referred to the racist attitudes of states leaders, particularly the governor, board members told him to "Shut up." He refused and the board walked out.

The Marshfield selectmen then sought to end the controversy by petitioning the board to change the name. Davis agreed, writing: "While I think this issue has been blown out of all proportion, nevertheless, if there are those, as there appear to be, who feel that the existence of the name is to some extent insulting or degrading, I personally feel that it would be better to clear the deck and come up with a brand new name. Emotions have run high on this matter and the continuance of the controversy would appear to indicate the existence of more racism in Vermont than I believe there can possibly be."

Both the mountain and pond took the name Marshfield.[357]

And in 2000 we heard the same excuses for inequality used by the south of my youth. In 2000 we had newspapers editorializing, in the 21st Century that "it isn't as easy to counter

[357] *Id*.

opposition to same-sex marriage" as it was to "counter racism in the civil rights era. The views of many opponents are shaped by ideas of sexuality taught by their religions. These moral teachings . . . have a legitimacy that racism does not have."

Well, no. Actually, it wasn't so "easy" during the civil rights era—not for the fighters on the front lines, although doubtless it *was* easier for the editorial writers of Vermont newspapers.[358] For a long time in the south, hate and the threat of violence were in the air, palpable things. Those who spoke as the elected representatives either averted their eyes or made excuses for the unconscionable. Most people went on with their daily routines, living their lives in uncomfortable silence, ignoring the injustice around them, leaving the fight to others. And the Bible was read to justify racism, just as easily as it is today used to justify homophobia.

E. PREJUDICE, THE COURTS, AND THE CHOICE ABOUT WHOM WE LOVE

> The life of the law has not been logic: It has been experience.
>
> Oliver Wendell Holmes[359]

My analogy with *Plessy v. Ferguson* and *Loving v. Virginia* presupposes that sexual orientation is not a *choice.* So did much of the homophobia in 2000.

The avalanche of homophobia that swept Vermont following *Baker* demonstrated that prejudice based on sexual orientation was real in Vermont.[360] The *Baker* court was an eminently legitimate act of the judiciary: to protect the civil rights of despised minorities. This is what courts are *for*—and it's why the civil rights of minorities ought not be decided by majority vote.[361]

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[358] The *Rutland Herald*'s longtime publisher, Robert Mitchell, put it well in 1964: "Here in Vermont we have a certain sense of superiority because there is so little evident among us the racial prejudice that has brought bloodshed to other parts of the country. . . . The absence of overt race friction in Vermont is, of course, not due to any special virtue on our part, but rather to the fact that in most of our communities there are few if any Negro residents." THE BOB MITCHELL YEARS 109-10 (1993). Notwithstanding Vermont's whiteness, Mitchell and his newspaper were fighters against prejudice and bigotry. *Id.* at 106-131.

[359] OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881).

[360] MELLO, MARRIAGE, *supra*.

[361] *Id*.

The *Rutland Herald*, in a lead editorial published the Sunday before Town Meeting Day 2000, made the same point indirectly. The newspaper asked, and then answered, a rhetorical question: If "constituents do not want [same-sex marriage or a comprehensive domestic partnership scheme], why should [legislators] approve it? The short answer, of course, is that all civil rights questions have tended to languish in the court of public opinion, since *the majority view causes discrimination in the first place.* It would be strange if the current case proved any different."[362]

1. Stuart Matis' Knees: Is Sexual Identity a "Choice"?

The demonization of gays and lesbians as immoral beings presupposes that people *choose* to be gay or lesbian. On the premise that sexual orientation is a "choice," many Vermonters—Take It To The People, for instance[363]—denied that this is a civil rights issue at all.

Some Vermont political leaders, and many ordinary Vermonters, see homosexuality as a "choice" (a "lifestyle choice," as some put it a bit scornfully) made by gays and lesbians. One Representative argued in 2000, "I think the argument that this is a civil rights issue is completely bogus. I see choice in sexual preference."[364] During the Senate floor debate on the civil unions bill, Senator John Crowley "said he had not seen any evidence to prove that homosexuality was anything other than a chosen lifestyle. Until evidence shows that it is not a matter of choice, Crowley said, he believes gays and lesbians should be disqualified from receiving the rights and benefits of marriage."[365]

Senator Crowley alluded to an interesting issue. On whose shoulders rests the burden of proof that homosexuality is or is not a choice? The Senator would place the burden on lesbians

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[362] Editorial, *Polling the Public*, Rutland Herald, March 5, 2000 (emphasis added).

[363] *E.g.*, Michelle Cummings, President, Take It To The People, *Opposing Same-Sex Marriage Not Bigotry*, Rutland Herald, March 26, 2000.

[364] Sandy Cooch, *Legislators Explain Their Votes*, The Herald of Randolph, March 23, 2000 (quoting Rep. Phillip Winters).

[365] Jack Hoffman, *Senate Backs Civil Unions*, Rutland Herald, April 19, 2000.

and gays to prove that they are telling the truth that they did not "choose" their sexual orientation. But I believe the burden of proof is on people like Senator Crowley to prove that homosexuality is *not* a choice. In the absence of such proof, I believe the witness of every gay and lesbian person I know that they did not choose their sexual orientation. Because I do not believe that all these gays and lesbians are lying about this point, I believe that opponents like Senator Crowley have not carried their burden of proof.

I also trust my own experience and instincts in concluding that sexual orientation—homosexual or heterosexual—is not a "choice." I certainly have no memory of "choosing" to be heterosexual. That's just the way I am. That's the way I've always been.

I don't presume to know what "makes" people gay or lesbian[366]—or what makes people homophobic bigots, for that matter. Maybe it's genetics. Some inconclusive scientific data suggests yes.[367] Maybe it's environment. Some inconclusive scientific data suggests yes. Maybe it's hormones. Some inconclusive scientific data suggests yes.[368] Maybe it's a combination. Maybe it's none of the above. I confess to feeling uncomfortable about the question whether homosexuality is "caused," even in part, by genetics or biology or anything else that suggests homosexuality is somehow "abnormal."

I do not believe anyone "chooses" their sexual orientation, however. What person with half a brain would "choose" to be gay or lesbian in the United States or in Vermont? When

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[366] "Until the early 1970s, the [American Psychiatric Association] regarded homosexuality as a pathology. After heavy lobbying from gay rights activists, including a psychiatrist who was a member of the APA and who spoke at the 1972 annual meeting, his face concealed by a mask to preserve his anonymity, the board of trustees voted to remove homosexuality from the [Diagnostic and Statistical Manual—IV]. The membership followed suit in 1974. (One bemused observed labeled it 'the single greatest cure in the history of psychiatry.')." Emily Eakin, *Bigotry as Mental Illness, or Just Another Norm*, N.Y. Times, Jan. 15, 2000.

As recently as 1968, the APA's DSM II labeled homosexuality (and oral sex, it appears) as a mental illness called "Sexual Deviation." The DSM II defined "Sexual Deviation" in this way: "This category is for individuals whose sexual interests are directed primarily towards objects other than people of the opposite sex, toward sexual acts not usually associated with coitus. . . ." *See* Word for Word, *Mental Disorders Defining the Line Between Behavior that's Vexing and Certifiable*, N.Y. Times, Dec. 19, 1999.

[367] For a thoughtful examination of this issue, *see* Heather Stephenson, *Why Gay? Science Can Offer Only Clues*, Rutland Herald, March 12, 2000.

[368] *Id.*

being gay means second-class citizenship? When it means, for many people, having to hide an essential part of their being from their families, their co-workers, their employers, their classmates? When, according to Vermont schoolteacher, and selectboard member Michael Quinn, "suicide is the Number 1 cause of death among gay and lesbian youths *of Vermont*"?[369] When "half a dozen teachers" at a Vermont high school "have made their rooms safe havens for homosexual students"?[370] After the lynching of Matthew Shepherd, who would *choose* to be gay? And, as the rhetoric of 2000 suggests, Vermont is not immune from the hate and prejudice that enabled the murder of Matthew Shepherd.

Wait, the opponents of same-sex marriage insist, gays are not discriminated against: They are equally free to marry a member of the opposite sex[371] or to remain celibate. There is, as one newspaper editorialized, an "Alice-In-Wonderland"[372] quality to this line of argument.

The first of these contentions reminds me of the fallacious argument that interracial marriage bans were not discriminatory because whites and African Americans were treated the same: Each was free to fall in love an marry someone of their same race. Or the argument that airline policies denying employment to flight attendants who become pregnant did not constitute sex discrimination because the policy applied to men and women equally: Any person, regardless of their sex, who became pregnant lost his or her job. Wink wink.

The "celibacy option" strikes me as psychologically unrealistic and simply cruel. If, as I

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[369] Alex Hanson, *Issue Won't Go On Windsor Ballot*, Valley News, Feb. 2, 2000 (quoting Michael Quinn).

[370] *Id.*

[371] For example, the president of Take It To The People explained: "When homosexuals are told they cannot marry someone of the same gender, they are not being discriminated against. The marriage law applies equally to them and to heterosexuals who must abide by the same (and other reasonable) restrictions." Michelle Cummings, President of Take It To The People, *Opposing Same-Sex Marriage Not Bigotry*, Rutland Herald, March 26, 2000.

Similarly, Republican gubernatorial candidate Ruth Dwyer reasoned: "'I don't consider it a civil rights issue', Dwyer said. 'Civil rights, as far as I'm concerned, have already been granted to just about every group out there. So civil rights have been addressed. Marriage is an institution, a union between a man and a woman, has been for thousands of years. *Every man and woman in this state has equal rights to marry*" a member of the opposite sex. *See* Jack Hoffman, *Dwyer: Lawmakers Moving Too Fast on Same-Sex Legislation*, The Times Argue [Barre and Montpelier, VT], March 14, 2000 (quoting Ruth Dwyer) (emphasis added).

[372] Editorial, *Dwyer's World*, Valley News, March 17, 2000.

believe, sexual orientation is not a choice—neither homosexuals nor heterosexuals "choose" their sexual orientation—then the celibacy alternative would deny homosexuals one of the most important and intimate ways of expressing human love. Passion and love are at the core of what it means to be alive, and to be human.[373]

Heterosexuals would impose on gays a celibacy they would not impose on themselves. This is the definition of an unjust law. Martin Luther King, Jr. wrote that "an unjust law is a code that a majority inflicts on a minority that is not binding on itself. This is difference made legal."[374] William Eskridge put it this way:

> Consider the following scenario. At an early age you are sexually attracted to left-handed people. This feels natural and good. However, through cultural osmosis you perceive that your family and surrounding society consider it deeply perverted for people with different dexterities to interact sexually. With horror you realize that you are left-handed and that your natural attraction is therefore perverted. You hide your feelings, and the biggest part of yourself, from your friends and family and pretend attraction to right-handed people. What feelings would you have? Anxiety? Shame? Hypocrisy? If you can imagine yourself in this situation, you can appreciate some of the pain felt by gay adolescents. Is this pain necessary to serve any larger social purpose?
>
> What happens when you, the left-hander attracted to other left-handers, become an adult? The stigma of this attraction will press you into a public and perhaps even a private denial of your feelings. You might even marry a right-hander in order to persuade others and perhaps yourself of your normalcy. The marriage is not likely to be satisfying to you or your partner. Is this pain, yours and your unaware partner's, justified by any larger social purpose? Is there any good reason why the state should not accommodate the needs of this minority of its citizens to marry the people they choose? . . .
>
> John Rawls maintains that the conditions of the social contract should be constructed as if the drafters were devising them behind a "veil of ignorance." That is, the drafters do not know what their own situation will be in the polity. They do not know whether they will be rich or poor, male or female, heterosexual or homosexual. If you were behind the veil of ignorance, would you be willing to deny equal rights to gay couples? This is not an entirely speculative enterprise. If you are heterosexual and desire to have children, are you willing to sacrifice the mental health of a potential gay child in order to adopt a double standard based on sexual orientation? Are you willing to press that child toward a greater chance of committing suicide?[375]

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[373] The Supreme Court came close to recognizing this reality in *Lawrence v. Texas*.

[374] King, *Letter From Birmingham City Jail*, *supra* at 294.

[375] E SKRIDGE, THE CASE, *supra* at 187-88.

People who advocate the celibacy option—and who argue that sexual identity is a choice—ought to tell it to the parents of Stuart Matis.[376] Matis was gay. He was celibate until the day he died at age 32.[377] He committed suicide.

As a devout Mormon, "as a pious churchgoer, Stuart Matis prayed and worked to change his sexual orientation. He died trying."[378]

"Even as a young boy, friends recall, Matis cherished his Mormon identity and the church's moral demands."[379] The Church of Mormon treats homosexuality as "an 'abominable' sin"; the church "requires gays and lesbians to remain forever celibate," and Matis "didn't dare consider intimacy with men he met, and apparently remained celibate his whole life."[380]

From age 7, "Matis began harboring a terrifying secret: he realized he was attracted to boys. For the next 20 years he kept the secret from everyone he knew and prayed fervently to God to make him heterosexual . . . Though he deeply loved his family, he showed little outward affection, fearing he would blurt out his secret. 'He would punish himself if he had a [homosexual] thought,' [said a childhood friend]. 'He wouldn't allow himself to go to a friend's birthday party or [wouldn't] watch his favorite TV program.' Instead, he would sit in his room and read scripture."[381]

As a college student at Brigham Young University, Matis spent "hours in the library looking for a technique for becoming straight. . . . A church therapist instructed him to suppress his sexuality or to undergo 'reparative' therapy to become a heterosexual."[382]

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[376] Mark Miller, *To Be Gay—and Mormon*, Newsweek, May 8, 2000.

[377] *Id.*

[378] *Id.*

[379] *Id.*

[380] *Id.*

[381] *Id.*

[382] *Id.*

At age 31, Matis told his parents he was gay. "To Matis' surprise, his family accepted his homosexuality."[383] His church did not. "Matis was especially frustrated by the church's energetic efforts to pass Proposition 22, California's ballot initiative banning same-sex marriage. The YES ON PROP 22 signs that dotted his Santa Clara neighborhood, many placed there by church members, were a reminder of his failure to find acceptance as a Mormon and gay man."[384]

On February 22, 2000, Matis wrote a suicide note to his family, "explaining why he couldn't continue to live,"[385] left the note no his bed, "drove to the local Mormon church headquarters, pinned a DO NOT RESUSCITATE note to his shirt, and shot himself in the head."[386]

"'Mother, Dad and family, I have committed suicide,' Matis' note began. 'I engaged my mind in a false dilemma: either one was gay or one was Christian. As I believed I was Christian, I believed I could never be gay.' Stuart Matis struggled his whole life to resolve that dilemma. The people who dressed him for burial were struck by the sight of his knees, deeply callused from praying for an answer that never came."[387]

Eleven days after the celibate gay Mormon man blew his brains out, California "overwhelmingly" approved the law banning same-sex marriage.[388]

At bottom, the argument by heterosexuals that gays "choose" their sexual orientation—or that they choose to act upon their sexual orientation and to express their passion and love for a person of the same sex—is a thinly-disguised criticism of homosexuality itself. The only reason to deny gays and lesbians the freedom of intimate expression of their love is because homosexuality itself is immoral, wrong, or at least inferior to heterosexual love. To deny people

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[383] *Id.*

[384] *Id.*

[385] *Id.*

[386] *Id.*

[387] *Id.*

[388] *Id.*

in love the freedom to make love can only be justified if the love itself is somehow wrong.

Susan Murray, one of the lead lawyers who brought the *Baker* lawsuit, told the House Judiciary Committee that "to talk about sexuality in terms of choice was to imply that it was better to be a heterosexual than a homosexual."[389] Beth Robinson, the other lead counsel in *Baker*, also addressed the choice issue in her legislative testimony. "Robinson pointed out that people have a choice about their religious faith. But the fact that a person's faith is chosen doesn't make it any less valid, she said."[390] It also doesn't make bans on interfaith marriage any less invalid.

In the end, heterosexuals arguing that homosexuals ought to just . . . act like them, brings to mind Henry Higgins' famous lament in *My Fair Lady*: "Why can't a woman be more like a man?" I think of Rex Harrison's refrain whenever I hear straights bemoan the simple fact of life that gays *aren't* straight. It seems weird to have to say that *gay people are gay*.

Sure, they can pretend they're otherwise. Many do. Many must—because of the prejudices that others impose on them. They have always pretended. Gays are masters at pretending. They've had to be. It's a basic survival skill.

Gays can pretend, they can pass. That's not the point. The point is *they shouldn't have to*. No human being should have to deny such a basic constituent of their personhood, their humanity.

2. Monte Stewart's Argument: Would Same-Sex Civil Marriage Undermine "Traditional" Civil Marriage?

Based on Monte Stewart's publications,[391] I expect him to argue today that recognizing same-sex marriage would undermine "traditional" heterosexual marriage. He's wrong.

Same-sex marriage will not undermine heterosexual marriage. To the contrary, the

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[389] Jack Hoffman, *Gay Marriage Lawyer Makes Emotional Plea*, Rutland Herald, Feb. 5, 2000.

[390] *Id.*

[391] *E.g.*, Monte Stewart, *Marriage Facts*, 31 HARV. J. L. & PUBLIC POLICY ___ (page proofs dated Oct. 22, 2007 (provided to this Commission by Monte Stewart).

existence of same-sex marriage could *strengthen* traditional, heterosexual marriage, by reminding we heteros that marriage really is a privilege worth fighting for. Gay marriage could strengthen traditional marriage in another way as well: competition. Conservative columnist William Safire explained:

> Rather than wring our hands and cry "abomination!", believers in family values should take up the challenge and repair our own house.
>
> Why do too many Americans derogate as losers those parents who put family ahead of career, or smack their lips reading about celebrities who switch spouses for fun? Why do we turn to the government for succor, to movie porn and violence for sex and thrills, to the Internet for companionship, to the restaurant for Thanksgiving dinner—when those functions are the ties that bind families?
>
> I used to fret about same-sex marriage. Maybe competition from responsible gays would revive opposite-sex marriage.[392]

Opponents of same-sex marriage argue the opposite, of course.[393] They predict that gay marriage would undermine heterosexual marriage.[394] However, opponents of gays and lesbians misunderstand not only the people who are the objects of their scorn. They also misunderstand the nature of the *civil* institution they would deny gay and lesbian couples.

Same-sex marriage does not undermine traditional marriage any more than golf undermines bowling. I have demonstrated that the only reason the Vermont legislature rejected marriage in lieu of civil unions was the political reality of homophobia.[395] I believe the maintenance of the legally required stigma of same-sex couples is not a legitimate governmental interest. Rather, Vermont's separate-but-equal system of marriage ought to be held unconstitutional for precisely the same reasons that *Brown v. Board of Education* held separate-but-equal public schools unconstitutional, and for the same reason the post-*Brown* cases held separate-but-equal busses, swimming pools, golf courses and libraries unconstitutional: Such

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[392] William Safire, *The Bedroom Door*, NY Times, June 30, 2003.

[393] *E.g.*, Stewart, *supra*.

[394] *Id*.

[395] M ELLO, MARRIAGE, *supra*.

legally-mandated segregation marks the segregated with an unmistakable badge of inferiority.[396]

It seems to me that opponents of same-sex marriage are overly preoccupied with the "sex" and not concerned enough with the "marriage." Sexual intimacy is a part of marriage, but it is not the only part and, in my own experience, it is not the most important part. My marriage is mostly about a day-to-day caring, a thousand little things and words and gestures, spoken and unspoken. And even when I think of physical intimacy, it's not sex that comes to mind. It's cuddling on the couch after a long and lousy day at work. It's my wife reaching for my hand as we stood side by side on the Gettysburg battlefield.

Heterosexual marriage isn't all about sex. Same-sex marriage would be little different, I imagine.

An editorial cartoon by Danziger captured this point perfectly. The cartoon included two identical frames. It was nighttime, with a crescent moon in the otherwise pitch-dark bedroom window. The pillow talk dialogue ran like this:

> Did you let the cat out?
> No, I thought you did.
> No, I told you I didn't.
> I thought you said you were going to take care of that.
> I never promised I would.
> You never do anything.
> I never do anything? What do you mean?
> You know what I mean.
> I certainly do not know what you mean. How would I know....
> Oh, You're impossible.
> I'm impossible? You're impossible!
> Well, no sex for you....

That is the left frame of the bifurcated cartoon. The right frame is identical. Same dark room. Same window. Same crescent moon. Same pillow talk.

The cartoon's caption was: "Heterosexual and Homosexual Marriage Contrasted."

"Traditional" heterosexual marriage would lose nothing by allowing same-sex couples into the marriage club. The right of civil marriage is not a zero-sum game, in which granting

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[396] For an outstanding analysis argument that civil unions are analogous to the separate-but-equal laws in the race context, see Barbara Cox, *But Why Not Marriage?*, 25 VT. L. REV. 113, 123-146 (2000).

gays the right to marry means that the heterosexual right to marry is devalued. By adding to the rights of same-sex couples, nothing is subtracted from heterosexual couples. The *Boston Globe* made this point well. "Heterosexuals and gays do not compete for rights; they share them."[397] In fact, same-sex unions "no more undermine traditional marriage than sailing undermines swimming."[398]

Most anti-same-sex marriage commentators don't even try to marshal evidence that gay marriage would undermine heterosexual marriage. Jeff Jacoby, a thoughtful columnist, did:

> Well, here's a shred of evidence: The *Boston Globe* reports that in the three years since Vermont extended near-marriage status to same-sex civil unions, nearly 5,700 gay and lesbian couples have registered their relationship. Of those couples, close to 40 percent, or more than 2,000, include at least one partner who used to be married.
>
> Just a shred—but a jarring one. Of course, it doesn't mean that Vermont's civil union law broke up 2,000 straight couples. It *does* mean that where there used to be 2,000 traditional marriages, there are now 2,000 ruptured ones—and 2,000 gay or lesbian unions in their place. Were some of those marriages doomed from the outset? Probably. But it's also probable that some of them weren't. In another time or another state, some of those marriages might have worked out. The old stigmas, the universal standards that were so important to family stability, might have given them a fighting chance. Without them, they were left exposed and vulnerable.[399]

As Jacoby conceded, this was only a "shred" of evidence. In fact, it's even less. Most of those civil unions were obtained by out of staters'. The evidence of civil unions' impact on marriage *in Vermont* points in the opposite direction. Steve Swayne crunched the numbers:

> Traditionalists . . . say that giving gay couples the benefits of marriage cheapens and undermines marriage. These accusations, if true, are . . . serious . . .. Vermont experiment, however, suggests that they are false.
>
> Take cheapen, for example. No one can prove that my civil union with my partner of 11 years devalues my neighbor's marriage. It's an opinion, and a silly one, for it masks a rather dim view of marriage. According to vital records reports from Vermont's Department of Health, there were fewer divorces in Vermont in 2001 (the first full year of the civil union law) than in 1999 (before there was a single civil union), but in 2000 and 2001, the number of divorces was significantly greater than the number of civil unions. Gay couples getting hitched

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[397] Editorial, *A Vermont Court Speaks*, Boston Globe, Dec. 21, 1999.

[398] *Id.*

[399] Jeff Jacoby, *The Threat From Gay Marriage*, Boston Globe, July 3, 2003.

> demean marriage more than straight couples getting unhitched? I don't buy it.
>
> As for undermining marriages, 6,056 marriages were performed in Vermont in 1999, 122 more than in 1998. In 2000, the first year civil unions were available, 6,271 marriages were performed in Vermont, 215 more than in 1999.
>
> Then there's the 2001 report, which found that 5,983 marriages were performed in Vermont, 288 less than in 2000. We'll have to wait for the 2002 report to see if 2001 was an anomaly (perhaps due to the terrorist attacks?) or part of a long-term trend. If the latter, traditionalists may have ammunition to argue that, as gay rights expand, marriage contracts. Still, I wager that none of the folks who got married in 2000 and 2001 feel that the civil union law weakens their marriages.
>
> There's another interesting statistic in the reports. "The percentage of civil (marriage) ceremonies increased to 58.9 percent in 2001. This percent has increased every year since 1990 when it was 47.2 percent." More and more couples are choosing a justice of the peace or a judge instead of a minister or rabbi to get married. This is as true for first-timers as for people who are getting married for the second or third time. In 2001, for example, more first-time Vermont bridges opted for civil ceremonies than for religious ones. (The flip-flop for grooms happened in 2000.)
>
> This statistic should concern traditionalists more than same-sex marriage. It says that more and more straight couples are separating the legal aspects of marriage from the liturgical ones, which is precisely what the courts are doing.
>
> Civil marriage in Vermont is now more popular than religious marriage, and I suspect that other states (and Canada) have also seen an increase in the number of civil ceremonies and a decrease in the number of religious ceremonies.[400]

Reading in 2000 about Randall Terry lobbying in Montpelier,[401] I felt like I was back home in Virginia, hearing how interracial marriage was an "abomination" and a crime against nature and God. Some Vermont opponents of civil unions didn't like Terry, and they told Terry to go home.[402] I wonder why Terry's openly-homophobic rhetoric made them so uncomfortable. I suspect it's because Terry blew their cover as avowed non-homophobes. They don't hate gays; they just believe in "legislature's rights" and the protection of what they call "traditional marriage."

Uh huh. This was all very familiar to me. During the battles over racial desegregation

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[400] Steve Swayne, *Separate State-Sanctioned Unions From Religious Marriages*, Valley News, June 21, 2003.

[401] *Terry's Crusade*, *supra*.

[402] Diane Derby, *Randall Terry is Told to "Go Home,"* Rutland Herald, Feb. 4, 2000.

when I was growing up in Virginia,[403] the rallying cry wasn't "we hate Blacks." The rallying cry—especially by lawyers—was "states' rights." The banner of "state's rights" (as well as the Bible and nature and all the rest) were used in the 1960s to justify segregation, as they had been used in the 1860s to justify slavery.

Likewise, the argument in support of the "traditional family"[404] boils down to bigotry against gays and lesbians. Same-sex marriage will not affect heterosexual marriages at all—the latter will remain unaffected by the inclusion of homosexual couples, *unless*, and only unless, same-sex couples are so immoral and evil that they would somehow pollute "traditional" marriages by their mere presence.

The argument that same-sex civil marriages would undermine or infect heterosexual marriages was nothing more than bigotry tarted up in legalistic doubletalk. "Take it to the People" was simply a homophobic hate group—albeit a genteel one, not unlike the White Citizens Councils and other "respectable" segregationists in the Jim Crow South. Substitute "race" for "homosexuals" in their position, and what they are becomes clear. Homophobia

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[403] In my youth, I committed an abomination or two myself. I lived with a woman when we were in college—"living in sin" was what it was called then—and we made love. Both the cohabitation and the lovemaking were illegal under Virginia law at the time (they may well still be illegal, for all I know), and unmarried cohabitation remains illegal in some states today, New Mexico and Arizona, for instance. *See* Jim Yardley, *Unmarried and Living Together, Till The Sheriff Do Us Part*, NY Times, March 25, 2000.

[404] In one of life's delicious little ironies, while Vermont's debate over "traditional [read heterosexual] marriage" was raging—and while the three Republican Presidential candidates were condemning same-sex marriage—the Fox television network aired a wildly popular TV show called *Who Wants to Marry a Millionaire*? On the show, a millionaire bachelor selected (based on her appearance and choice of wedding gown) a woman he had never previously me and immediately married her on national TV, and the whole thing was a ratings bonanza (23 million viewers):

> In a live broadcast from Las Vegas, a real estate developer selected an instant bride from among 50 contestants, who vied for his lifetime commitment via swimsuit displays and perfunctory interviews. No pretense of a "talent" competition was thought necessary.
>
> When appalled viewers wondered why this wasn't prostitution, Nevada Deputy District Attorney J. Charles Thompson explained, "It's often the case that people have sex and then get married, but you can do it the other way. We don't mind." His office had higher enforcement priorities. And it should.
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> . . .
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> Fox's blushing bride emerged from her self-confessed "error of judgment" with a quick annulment and prizes worth more than $100,000.

Deborah Rhode, *Fox Ignored Real Sex Trade*, National L.J., March 13, 2000.

The fierce critics of same-sex marriage were relatively silent, presumably because this counted as "traditional marriage" because it was heterosexual.

enshrouded in "traditional family values" is still homophobia. As between the two, Randall Terry and "Take it to the People," I much prefer the open and honest bigotry of Randall Terry. I prefer bigotry raw, not diluted by the base alloys of hypocrisy and lawyerly doublespeak.

Many opponents of same-sex marriage—those opponents I think of genteel homophobes and bigots—deny that they are homophobes or bigots. They purport to hate the sin but love the sinner (although they would deny extending any marriage-like benefits to homosexuals, not to homosexuality).

These people are most readily identifiable by their buts.[405] As in, "I don't loathe homosexuals, *but* homosexuality is an abomination [a sin, an evil, a perversion of nature, the moral equivalent of child rape, sex with animals, polygamy, bigamy, etc.]." Sometimes the "but" is silent, but it's always there. To choose one random example from today's newspaper, a letter to the editor began by saying that "[t]his whole debate on same-sex union has nothing to do with hate or malice toward our gay brothers and sisters."[406] After a silent "but," the next two sentences in the letter were: "It [*i.e.*, the debate] does have a lot to do with Jesus Christ saying, 'Go, and sin no more, your past sins are forgiven you.' Many people have died of AIDS."[407] Then, after suggesting that AIDS might be God's judgment against gay people, the letter concluded: "Is there a message in the above statements [*i.e.*, about Jesus' admonition to sin no more and AIDS]? Maybe, just maybe."[408]

Opponents of same-sex marriage also assert that they aren't attacking gays and lesbians; they're just trying to protect the institution they call "traditional" marriage. I think people who make this argument are deluding themselves, and they're deluding themselves in exactly the

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[405] As in: "I have friends who are gay, and I have friends who are lesbians. They are good people, *but* at some point we must stop treading water and retake our fundamental standards and our morality. . . . [Homosexuals] chose this very sick lifestyle on their own." *See* Letter to the Editor, Valley News, May 3, 2000 (emphasis added).

[406] Letter to the Editor, Burlington Free Press, April 16, 2000.

[407] *Id.*

[408] *Id.*

same way that opponents of interracial marriage deluded themselves into thinking they weren't racist.

Gay-bashers even try to don the cloak of victimhood: Their free-speech rights are being violated by people like me calling them homophobes and bigots and by forcing them to live in a state that provides same-sex couples with the benefits of marriage. These poor, discriminated-against, put-upon heterosexuals remind me of my white classmates in Virginia who claimed that *their* civil rights were violated by having to share a school bus or a classroom with African Americans.

Actually, the grievances of the Vermont homophobes are even less credible than the racist complaints of my junior high school classmates. My classmates did indeed have to share busses and classrooms and lunchrooms with African Americans in close proximity. But the Vermont homophobes do not even need to do that: They need not even be in close quarters with gay or lesbian couples. Rather, their complaint is that their civil rights are violated by simply *knowing* that, somewhere else in Vermont, there are same-sex couples who are living their lives as civilly unionized couples.

The civil rights of these homophobic Vermonters are not violated by having to live in a state that recognizes civil unions or same-sex marriages. It is they who would deny gays and lesbians the civil right to marry. The homophobes will remain free to hate homosexuals, to teach their children to hate homosexuals, to exclude homosexuals from their homes and their social circles. No law—and no court—has jurisdiction over the hatred in individual human hearts. But the courts do have jurisdiction over the laws, and the *law* should countenance no inequality between heterosexual marriage and gay marriage. Any distinction that marks same-sex couples with a badge of inferiority—which is to say, in the present climate, any distinction—should be struck down for the same reasons that Jim Crow separate-but-equal public schools, public busses, public swimming pools, public golf courses, and public lunch rooms were struck down by the courts in the aftermath of *Brown v. Board of Education*.

Amid the dehumanizing rhetoric of the debate over same-sex marriage, it is important to remember the *people* who brought the *Baker* case. The plaintiffs in *Baker* were three same-sex couples who had lived together in committed relationships for periods ranging from 6 to 27 years. Two of the couples had raised children together. Each couple applied for a Vermont marriage license, and each was denied.

The *Baker* plaintiffs underscore the basic truth of the *Baker* ruling and the same-sex marriage debate: that gays and lesbians are people, too. The *Baker* plaintiffs reinforce the reality that gays and lesbians are *already* part of families all across Vermont and America. They are already part of the day-to-day of life here in Vermont and, indeed, everywhere.

3. The "Right To Be Ordinary"

Anna Quindlen has observed that the right being sought by same-sex couples is in essence the "right to be ordinary."[409] Sometimes, Quindlen wrote, it's difficult to "put your finger on the tipping point of tolerance. It's not usually the Thurgood Marshalls and the Sally Rides, the big headlines and the major stories. It's in the small incremental ways the world stops seeing differences as threatening. It's the woman at the next desk, the guy behind the counter at the deli. And it's finally happening for gays and lesbians. They're becoming ordinary."[410] Same-sex marriages, or civil unions in Vermont, would be much like my own marriage. "Happy families and happy friends watched happy people pledge their love. Big deal. Ho-hum. Yawn"[411] And, "by the way, hurray."[412]

F. PLEASE PROVE MY PREDICTION WRONG: BE A PIONEER, AGAIN

1. Do the Right Thing

In my gay marriage book, I predicted that the Vermont legislature would not, for a long

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[409] Anna Quindlen, *The Right To Be Ordinary*, Newsweek, Sept. 11, 2000.

[410] *Id.*

[411] *Id.*

[412] *Id.*

time and perhaps ever, take the final step to same-sex marriage. I very much hope the Vermont legislature will prove me wrong.

In 2000 Vermont was a pioneer in enacting civil unions. The rest of the nation and world watched events here closely in 2000. *Baker* and its aftermath received significant coverage in the national and international press.[413]

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[413] *E.g.*, Hanna Rosin, *Small Town in Vermont Mirrors Split on Gay* Unions, Pittsburgh Post-Gazette, October 15, 2000; Patrick Cole, *In Vermont, Governor Feels Voters'* Heat, Chicago Tribune, October 13, 2000; Patrick Cole, *Gay Union Law Divides Vermont, Attracts Scores of Out-Of*-Staters, Chicago Tribune, October, 13, 2000; Fred Bayles, *Civil Union Law Sparks Backlash*, USA Today, Oct. 4, 2000; James Bandler, *Anger Over Civil-Union Law Shapes Vt. Governor Race*, The Wall Street Journal, Sept. 27, 2000; Daniela Altimari, *Heading to Vermont For That Coveted Piece of Paper*, The Hartford Courant, Sept. 18, 2000; Hubert B. Herring, *Gay Rights, Here and There*, New York Times, Sept. 17, 2000; Steve Buttry, *State Not Ready for Gay Marriages*, Omaha World-Herald, Sept. 17, 2000; Ben White, *Vermont Divisions Harden Over Civil Unions Law*, The Washington Post, Sept. 17, 2000; Kim Cobb, *Vermont Politicians Seeing Fallout From Gay-Union Law*, Houston Chronicle, Sept. 16, 2000; *Vt. 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Legislator Gets An Earful From Voters; Campaign is First Since Civil Union Bill Passed*, The Boston Globe, Sept. 10, 2000; Ross Sneyd, *Vermont Vote On Gays Not Over Yet; Lawmakers Facing Backlash At Polls,* The Cincinnati Enquirer, Sept. 7, 2000; Carey Goldberg, *Descent Into A State of Anger: Civil-unions Law Brings Out Tensions Between Old-and-New-Style Vermonters*, The Dallas Morning News, Sept. 4, 2000; Carey Goldberg, *Vermont Residents Split Over Civil Unions Law*, New York Times New Service, Sept. 3, 2000; Adam Gorlick, *State Delegates Nervous About Political Fallout From Civil Unions Law*, AP, Aug. 14, 2000; James Bandler, *Foes of Civil Unions Vow to 'Take Back Vermont',* The Wall Street Journal, Aug. 9, 2000; Carol Ness, *Couples Flock to Vermont Only Legal Place to Get Hitched*, San Francisco Examiner, Aug. 7, 2000; Eleanor Yant, *Allentown Couple Celebrates Civil Unions*, Allentown Morning Call, Aug. 6, 2000; *Iowa Couple Takes Advantage of Vermont Civil Union Law*, Davenport, Iowa (AP), July 29, 2000; *Same-sex Union Foe Names Surrogate,* The Grand Rapids Press, July 27, 2000; Carey Goldberg, *Gay Couples Flocking to Vermont,* Pittsburgh Post-Gazette, July 25, 2000; Ross Sneyd, *Politicians Hopeful on Gay Rights*, Times Union Albany, July 25, 2000; Kevin Kelley, *Vermont GOP Same-sex Law Backers Face Party Backlash*, The Detroit News, July 24, 2000; Raphael Lewis, *Honeymoon In Vermont. 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For the Vermont legislature to enact marriage—on its own, not at the barrel of a judicial gun—would be an event of symbolic and practical significance.

Enacting same-sex marriage would be symbolic because it would place Vermont, again, at the leading edge of marital equality for same-sex couples. The nation would pay attention. The world would pay attention.

Enacting same-sex marriage would be significant legally and practically because of a quirk in Massachusetts law. Gay marriage in Massachusetts is limited to in-state residents. By contrast, Vermont civil unions—and presumably marriage as well—would be open to out-of-state couples.

For the portability of gay marriage to be tested in courts, and ultimately in the U.S. Supreme Court, gay couples who marry in one state must move in another state. A Vermont marriage statute open to all Americans would make this more likely to occur.

Vermont was a pioneer in 2000. Please be a pioneer again. Please prove my prediction wrong.

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2. Where the Buck Stops: The Vermont Supreme Court, and the Road to *Baker II*

a. The End of *Baker I*

A page of history is worth a volume of logic.

Oliver Wendell Holmes[414]

The *Baker* majority was explicit that it was *not* holding that there is *no* constitutional right of same-sex couples to marry. That issue the court saved for another day: "While some future case may attempt to establish that—notwithstanding equal benefits and protections under Vermont law—the denial of a marriage license operates per se to deny constitutionally protected rights, that is not the claim we address today."[415]

The issue will not, however, return to the Vermont Supreme Court in *Baker* itself. On May 10, 2000, the AP reported that the three same-sex couples in *Baker* "will ask that their case be dismissed by the Vermont Supreme Court, their lawyer said."[416] According to attorney Beth Robinson, the couples decided that they would ask to withdraw the lawsuit when the civil unions law goes into effect on July 1. "'We're all kind of committed to the notion of trying to deal with healing,'" Robinson explained.[417] Indeed, given Robinson's and her co-counsel's active role in advocating for the civil unions bill, they would have had a difficult time arguing in the Vermont Supreme Court that the bill the lawyers themselves worked to pass was in fact unconstitutional.[418]

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[414] New York Trust v. Eisner, 265 U.S. 345, 349 (1921) (quoted in John Witte, *The Tradition of Traditional Marriage*, in DEBATE, *supra*, at 47.

[415] *Baker, supra*.

[416] Ross Sneyd, AP, *Gay Rights Suit Ended*, Rutland Herald, May 10, 2000.

[417] *Id* (quoting Beth Robinson).

[418] As a strategic matter, I was not at all sure that the gay community ought, to have partied in the legislative process or supported *any* domestic partnership or civil unions bill. Under *Baker*, a comprehensive domestic partnership approach was the *minimum* that *might* pass constitutional muster. Thus, I wonder whether the gay community ought to have endorsed anything short of same-sex marriage. I saw no real downside here.

I did see a downside in the gay community's supporting legislation that is anything short of marriage. The downside was that it provided legislators, Governor Dean, and perhaps even a supreme court justice or two political cover in compromising for civil unions: These folks could point proudly to the second-class citizenship conferred by civil unions, and say, "See, even the gay leadership thinks domestic partnership is enough." With gay support behind

Professor Greg Johnson has written bluntly that the lawyer's decision to drop the *Baker* lawsuit was wise: "If the plaintiffs had gone back to the Vermont Supreme Court, they would have lost, and not by a 3-2 margin, or even 4-1, but 5-0."[419]

I'm not quite so pessimistic. Still, it would be very difficult for the *Baker* court to invalidate the comprehensive civil unions system adopted by the legislature. At significant

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a civil unions statute, the supreme court would have a tougher time voiding that statute in favor of requiring same-sex marriage.

How's this for a strategy: The gay community conscientiously abstains from participation in the legislative process and cedes the field to the haters. The legislature passes a second-rate domestic partnership bill (which it was likely to do regardless of whether or not the gay community participated in the legislative process), which Governor Dean happily signs into law (as opposed to a marriage bill, which Dean might well have vetoed, in the unlikely event that the legislature would ever pass such a bill). Then the law comes before the Vermont Supreme Court, which must pass on its constitutionality. If the new law is a shoddy enough example of separate but obviously unequal—and the haters and the governor all but guarantee that it would be—then the supreme court would have little difficulty striking it down, and, by then, there might be three votes on the court for same-sex *marriage*.

The foregoing was the Machiavellian game plan I articulated in the original February 8, 2000, version of this book. Beth Robinson, a lawyer for the same-sex couples in *Baker*, took a different approach—she worked hard and in good faith with the House Judiciary Committee to produce the best, most comprehensive system of domestic partnerships possible—and I don't blame her.

In her testimony before the Senate Judiciary Committee, Ms. Robinson reportedly said the lawyers "remain convinced that the only way to provide same-sex couples with true equality would be to allow them to marry . . . [However, the] 'freedom to marry community supports this [comprehensive domestic partnership] bill as a step to equity,' Robinson said." *See* Ross Sneyd, AP, *Gay Rights Plaintiff Addresses Vt Panel*, Valley News, March 23, 2000. Nina Beck, the only one of the *Baker* plaintiffs to speak to the legislature, *id.*, also argued in favor of marriage. *Id.*

Had I been in Ms. Robinson's position, I'm honestly not sure what I would have done. The *Baker* court's punt to the legislature presented Ms. Robinson, and the other lawyers for the same-sex couples, with a heart-wrenching moral, tactical and strategic dilemma. On the one hand, ought they work with the legislature to fashion the best possible version of a civil unions bill, which would greatly improve the day-to-day lives of same-sex couples in Vermont, but knowing (1) that such a bill would be most likely to pass constitutional muster when the new statute comes before the court for review in *Baker*, and (2) that the *Baker* lawyers' participation in the legislative process would compromise their subsequent ability to argue, in the Vermont Supreme Court, that the bill on which they had worked was in fact unconstitutional? Or, on the other hand, ought they boycott the legislative process, knowing that, without their input, the resulting bill would probably be inadequate and thus vulnerable to attack in the Vermont Supreme Court? The second option would be a high-stakes gamble, because the court might well uphold the watered-down version of domestic partnership.

Had the legislature rejected the comprehensive civil unions bill in favor of some sort of marriage lite, the *Baker* lawyers would be in a strong position to argue in the Supreme Court: "Look we participated in good faith in the legislative process and endorsed the only marriage substitute that passes muster under *Baker*: a truly comprehensive system of domestic partnership. The watered-down version enacted by the full legislature fails under *Baker*, and this court should so hold." The problem is that, in that case, the *Baker* counsel would have a hard time arguing that *Baker* requires marriage or anything other than a comprehensive partnership system, since that was what the lawyers supported in the legislature.

It is important to keep in mind that the *Baker* "majority" was such only by the margin of a single vote. Justice Johnson would require marriage, and Justice Dooley's concurrence might well require marriage as well. That left chief Justice Amestoy's opinion for the three-justice majority. We know where the Chief Justice was on the issue—domestic partnerships are sufficient—but the other two justices remained silent in *Baker*. We don't know what either or both of them might do when confronted with an actual system of domestic partnerships—particularly with a statute that was not marriage solely due to the homophobic reaction to *Baker*. The ultimate holding could still be that same-sex couples must be allowed the right of civil marriage.

Stay tuned.

[419] Greg Johnson, *Vermont Civil Unions*, 25 VT. L. REV. 15, 50 (2000).

political risk the legislature did what the *Baker* court suggested: It enacted a parallel system of benefits that looks a lot like marriage. I have difficulty imagining the court invalidating a remedy that the court itself had suggested. Still, I think the court should do exactly that.

b. Retrospective Justification

> This is something material, something I can see, feel and understand. This means victory. This *is* victory.
>
> Abraham Lincoln, upon receiving a captured Confederate battle flag

Some folks claim that the negative public reaction against gayls and the court is evidence that the court was wrong in *Baker*. I think the opposite is true. Every homophobic letter to the editor; every signature of the 25,2000 who signed the petitions opposing extending to same-sex couples marriage or a marriage substitute; every anti-gay letter and statement by the leadership of Vermont's clergy; every rabid bit of gay-bashing by elected representatives like Nancy Sheltra—every one of these things authenticates, validates and reinforces the premisses central to the legitimacy of the *Baker* decision: that gays are a despised minority especially in need of *judicial* protection of their fundamental civil rights, including the basic human right of civil marriage.

The outpouring of homophobia in Vermont—the genteel homophobes as well as the rabid bigots—reinforces the fact that *Baker v. State* was a civil rights case brought on behalf of a minority people whose sexual orientation is feared and loathed by a significant portion of the majority population. It is now clear—if it wasn't clear at the time *Baker* was decided—that gays are indeed a despised minority in Vermont. It is the job of the courts to protect the civil rights of despised minorities. It is up to the Vermont Supreme Court today—as it was up to the judiciary in the civil rights era of the 1950s and 1960s—to enforce the fundamental civil rights of Vermont's homosexual minority.

Again, I don't mean to underestimate how hard it would be on the justices to hold that civil rights principles mandate the recognition of same-sex marriage. Judges are human beings,

and—as the lower court judges in the south who implemented *Brown v. Board of Education* could attest—[420]the condemnation of their friends and neighbors hurt. However, as Justice Johnson noted in her *Baker* dissent, "constitutional rights may not be denied simply because of hostility to their assertion or exercise."[421]

Because *Baker* was a civil rights case, I think it should have been decided under civil rights principles. One such principle is that statutes that burden unpopular and disfavored minorities—including, in my view, gays and lesbians—are subject to strict judicial scrutiny. In order to pass constitutional muster under "strict scrutiny," the classification must serve a compelling state interest that cannot be satisfied by any other, less-restrictive means. Under "strict scrutiny," the justification for prohibiting same-sex marriages—the notion that such unions are so immoral that they would pollute and undermine traditional heterosexual marriages—should fail.

The homophobic reaction to *Baker* persuaded at least one member of the House of Representatives that this fight is indeed a matter of protecting the civil rights of a despised minority. Representative Derek Levin explained his vote in favor of the comprehensive civil unions bill: "The thousands of e-mails and letters filled with hatred and fear that were delivered to each of us at the statehouse towards gay and lesbian people was what convinced me. The threats of eternal damnation for each of us who might vote favorably on this convinced me. The hatred and physical threats in some of those letters directed at me convinced me. Echoes of the civil rights past convinced me."[422]

Perhaps these same things will convince a majority of the Vermont Supreme Court to acknowledge that *Baker* was a civil rights case brought on behalf of a despised minority and that

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[420] Bass, *supra*.

[421] *Baker, supra*.

[422] Rep. Derek Levin, *Civil Union Issue Winds Through Legislative Maze*, The Vermont Standard [Woodstock], March 30, 2000.

the separate system of domestic partnerships is inherently unequal and thus unconstitutional. In any event, the Vermont Supreme Court might well not have the final say on the legality of any domestic partnership law. The federal courts could still invalidate the post-*Baker* statute under the Equal Protection Clause of the U.S. Constitution—as the U.S. Supreme Court invalidated an amendment to the Colorado Constitution that (1) pervasively denied rights of nondiscrimination to gays and (2) was enacted based on animus towards gays and lesbians. The rights recognized by *Baker* were grounded in the state Constitution, but those state-created rights cannot be denied in a way that offends the federal Constitution.

c. The 2003 Texas Privacy Case: *Lawrence v. Texas*

If the U.S. Supreme Court meant what it said in a 2003 Texas privacy case, the underpinnings of the opposition to same-sex marriage have been undermined. The majority opinion in *Lawrence v. Texas* began:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.[423]

The majority emphasized that the issue was about privacy, not sex: "The case should be resolved by determining whether [John Lawrence and Tyron Garner] were free as adults to engage in the private conduct in the exercise of their liberty."[424] The important question was *not* whether the "Constitution conferred a right upon homosexuals to engage in sodomy."[425] Framing the issue this way "fail[s] to appreciate the liberty at stake."[426] To reduce the lives of gays and

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[423] *Lawrence v. Texas,* 71 USLW 4575 (2003).

[424] *Id.*

[425] *Lawrence, id.* at 4576 (quoting Bowers v. Hardwick, 478 U.S. 186, 190 (1986)).

[426] *Id.*

lesbians to sex

> demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.
>
> This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.[427]

The *Lawrence* Court overruled a 1986 decision. That decision, *Bowers v. Hardwick*, upheld the ability of the state to criminalize "sodomy" between consenting adults, regardless of sexual orientation. The Texas sodomy statute in *Lawrence* was limited to gay conduct. The *Lawrence* Court could have struck down the Texas statute without overruling *Bowers* by "declaring the Texas statute invalid under the Equal Protection Clause." Rather, the court declared the following:

> That is a tenable argument, but we conclude the instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.
>
> Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.
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> * * *

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[427] *Id.*

> *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.[428]

G. BUT MAYBE I'M WRONG

> I see great parallels [between the current situation and the Black rights movement of the 1960s and the laws banning interracial marriage in the segregated south]. Like the laws banning interracial marriage, those against gay marriage are bigoted and wrong.
>
> Phil Nubek, testifying before this Commission (Oct. 10, 2007)[429]

The civil unions analysis I just completed above may be completely wrong. This is the flaw: Leading gay rights activists and scholars disagree with me. Far from viewing civil unions as a "badge of inferiority" or a resurrection of separate-but-equal, thinkers and leaders such as Greg Johnson,[430] William Eskridge,[431] and Beth Robinson strongly supported civil unions.

Yale Law School Professor William Eskridge argues powerfully that civil unions will not relegate same-sex civil couples to a separate-but-equal status that would ultimately prove unequal. Eskridge asserts that gays and lesbians should support compromises like Vermont's statute without giving up on full marital equality. Compromises like civil unions will deliver legal rights and duties urgently needed by same-sex couples. They will also help create an environment in which same-sex couples are more likely, in the end, to win fully equal treatment of their relationships by the state.

Professor Eskridge, while conceding that civil unions are far from equal to civil marriage, argues that "it is greatly unfair to tag the civil unions measure as 'separate but equal'" and that *Baker* and civil unions bear closer kinship to *Brown v. Board of Education* than to the separate-but-equal case of *Plessy v. Ferguson.*[432] Vermont Law School Professor Greg Johnson contends that, far from stigmatizing same-

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[428] *Id.* at 4579.

[429] Nathan Burgess, *Gay Marriage Forum Held*, County Courier, Oct. 18, 2007 (quoting Phil Nubek).

[430] Greg Johnson, *Vermont Civil Unions: A Success Story*, in MARRIAGE AND SAME-SEX UNIONS: A DEBATE 283 (Lynn Wardle et al, eds. 2003).

[431] ESKRIDGE, CIVIL UNIONS, *supra* at 140.

[432] ESKRIDGE, CIVIL UNIONS, *supra*, at 133-39 and 140.

sex couples with a badge of inferiority, civil unions liberate them to craft a new institution unburdened by the mess we heterosexuals have made of marriage; *vive la difference*, Johnson declares.[433]

Greg Johnson argues that civil unions provide same-sex couples with a grand opportunity to sculpt their *own* identities as couples, unencumbered by the baggage associated with heterosexual marriage.[434] *Viva la difference*, he celebrates.[435]

There is truth in this. They may be right. And I want to join in the celebration of civil unions. I really do. But I can't. For me, the only thing equal to marriage is marriage.

Since June 2003, we have had something of a test environment against which to measure civil unions against same-sex marriage. From 2001 to June 2003, Vermont's civil unions law was the only easy option open, in the western hemisphere, to gay and lesbian couples. In June 2003 the appellate court of Ontario, Canada, recognized same-sex marriage.[436] Marriage licenses were issued that same day.[437]

It will be interesting to see whether Vermont remains the destination-of-choice for same-sex couples who want to get hitched. The vast majority of couples who have been "CUd" in Vermont were out-of-staters, and most of them have come from a privileged group. Around 90% have been white; most are college graduates in their 30s and 40s; they typically earn above-average incomes.[438]

Will these couples continue to travel to Vermont for civil unions? Or will they travel an hour more to Canada, where they can get married? Canada, like Vermont, has no residency or

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[433] Greg Johnson, *Vermont Civil Unions: A Success Story* in MARRIAGE AND SAME-SEX UNIONS: A DEBATE 283 and 292 (Lynn Wardle, et al., eds. 2003).

[434] Johnson, *supra*.

[435] *Id.* at 392.

[436] Halpern v. Toronto, 2003 WL34950 (Ontario Ct. App. June 11, 2003).

[437] Tom Cohen, AP, *Dozens in Canada Follow Gay Couple's Lead*, Wash. Post, June 11, 2003.

[438] Patricia Wen, *A Civil Tradition*, Boston Globe, June 29, 2003.

nationality requirements for marriage.[439] Same-sex marriages in Canada are no more (or less) likely to be recognized by other states than are Vermont civil unions. Will civil unions decline in Vermont, now that true marriage is equally available in Canada?

The comprehensive civil unions law was a significant step forward on the road to the matrimonial equality. It was a proud step. But Steve Nelson is right that "our aspirations should be higher."[440]

Nelson continued: "I and others have compared this legislation to the separate-but-equal sins of our past. The civil unions bill may provide equivalent legal rights to Vermont's gay couples, but these rights are offered with condescension and reluctance. Although we are now out of the downpour of hatred that soaks most of America, subtle bigotry still hangs heavy over Vermont's hills. We have begrudgingly granted gay men and women rights they have been long denied, but they ought not to feel grateful and we ought not to feel righteous."[441] The danger "is that this compromise solution goes just far enough to mire us in moral complacency for decades to come."[442]

In its time, the *Plessy v. Ferguson* was doubtless hailed by "moderates" as an important victory in the ongoing struggle for full equality. After all, the doctrine did require that facilities be *equal* as well as separate. We must go slow, the moderates would have urged. We must take "political reality" into account.

However, partial victories like *Plessy* tend to become prisons. It took African Americans six decades to break free of the prison erected by the *Plessy* victory. I wonder how long gay and lesbian Vermonters and Americans will have to wait before being released from the victory of civil unions.

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223 Editorial, *Canada's Celebration of Marriage*, NY Times, June 19, 2003.

[440] Steve Nelson, *Mackinnon Shouldn't Be Bashed For Sticking to Principle*, Valley News, March 26, 2000.

[441] *Id.*

[442] *Id.*

H. CONCLUSION

> We will have to repent in this generation not merely for the vitriolic words and actions of the bad people, but for the appalling silence of the good people.
>
> Martin Luther King, Jr., *Letter From Birmingham City Jail* (April 16, 1963).[443]

I've wondered, over the years since *Baker*, what makes people so fearful of gay people. My mother, Mrs. Ida Goldberg Mello, taught me from before I remember that we Jews have the least excuse of any group to discriminate against others because of who they are: We, of all people, should know better. My Jewish mother also taught me that it was the height of stupidity—and of mental, intellectual and moral laziness—to judge an individual by his or her membership in a group. Groups include both good and bad members, and I was obligated to take each person as an individual, one at a time.

It has now been seven years since the civil union statute became the law of Vermont. As of July 11, 2003, Vermont had issued at least 5,786 civil union licenses.[444] Eighty-five percent of those have been issued to out-of-state couples.[445]

In the years since Vermont's civil unions statute made history, I am pleased to report that the sky has not fallen. The Connecticut River has not turned to blood.[446] There have been no

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[443] Martin Luther King, Jr., *Letter From Birmingham City Jail* (April 16, 1963), in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 296 (James Washington ed. 1986).

[444] Darren Allen, *Gay Marriage*, Rutland Herald, July 13, 2003.

[445] Debra Rosenberg, *Breaking Up Is Hard to Do*, Newsweek, July 7, 2003.

[446] Exodus, ch. 7, verse 20.

plagues of frogs,[447] flies,[448] boils,[449] or locusts.[450] Our cattle have not fallen over dead.[451]

Actually, everyday life remains unchanged. The mountains are as majestic as ever. The air is crisp as ever. Winter is long as ever. My neighbors still buy their newspapers and milk at Ken's Country Store. People still mow their lawns. The local sheep seem unchanged. The main topic of conversation is still the weather.

There are a few changes, if you know where to look for them. Civil unions announcements appear occasionally in some local newspapers. Bed-and-breakfasts advertise civil union specials on gay and lesbian websites. An online outfit "has booked travel arrangements for couples from Russia, Indonesia and Australia who are planning civil unions in Vermont."[452]

Behind closed doors, same-sex couples have more legal rights—but still less than my wife and I have. Hopefully, they feel safer and a bit more equal.

The battlefields over same-sex unions, and over gay rights generally, moved on. After Vermont allowed civil unions, Texas became the 37th state to outlaw same-sex marriages. Same-sex couples in Massachusetts, won the right to marry. Connecticut enacted a civil unions statute. The legislatures of Connecticut, Montana, and Rhode Island considered and rejected bills to recognize gay marriage.[453] A Texas judge refused to divorce a gay couple who had obtained a civil union in Vermont. Canada legalized gay marriage. The U.S. Supreme Court struck down sodomy statues and recognized that same-sex couples have a constitutional right to privacy. Episcopalians in the Diocese of New Hampshire elected as their leader the first openly gay bishop

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[447] Exodus, ch. 8, verse 6.

[448] Exodus, ch. 8, verse 24.

[449] Exodus, ch. 9, verse 9.

[450] Exodus, ch. 11, verse 14.

[451] Exodus, ch. 9, verse 3.

[452] Tammerlin Drummond, *The Marrying Kind*, Time, May 14, 2001.

[453] Sarah Kershaw, *Adversaries on Gay Rights Vow State-by-State Fight*, NY Times, July 6, 2003.

anywhere in the world.[454] Wal-Mart, the nation's largest private employer, extended its anti-discrimination policies to protect gay and lesbian employees.[455] The *New York Times* now includes the quasi-nuptials of gay and lesbian couples, transforming its "weddings" pages into "weddings/celebrations" pages.[456]

In Vermont, however, nothing much has changed. That fact may be the strongest argument in favor of same-sex marriage.

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[454] *E.g.*, Laurie Goodstein, *New Hampshire Episcopalians Choose Gay Bishop, and Conflict*, NY Times, June 8, 2003.

[455] Sarah Kershaw, *Wal-Mart Sets a New Policy That Protects Gay Workers*, NY Times, July 2, 2003.

[456] *Gay Old Times*, New Yorker, Sept. 2, 2002.

Index of Attachments

1. The Crenshaw Family Memos

2. Selected *Amicus* Briefs, *Opinion of the Justices to the Senate*, 802 N.E. 2d 565 (Mass. 2004)

3. Excerpts From Commencement Address at VLS (May 8, 2002)

4. Newsclips

5. Materials By Gay And Lesbian Advocates and Defenders (GLAD) Comparing Civil Unions and Gay Marriage

6. CV and Publications List of Michael Mello

To: The Vermont Commission on Family Recognition and Protection
Thomas A. Little, Esq., Chair

c/o: Legislative Council
115 State Street
Montpelier, VT 05633-5301

Date: Tuesday, March 04, 2008

I am writing to you on behalf of myself and my social scientist colleagues identified below, to offer our support for extending marriage rights to same-sex parented families. I am an Associate Professor at The University of Vermont with a Ph.D. in Experimental Psychology (with a focus on Developmental Psychology) earned in 1993 (from The University of Vermont). My professional organization is the American Psychological Association. My teaching, research, and professional service focus on adult development and family issues, with particular attention paid to lesbian, gay, bisexual, and transgender (LGBT) development and family issues. I teach courses on these issues as part of UVM's Human Development & Family Studies Program, and many of my courses are also accepted for credit within UVM's Women's & Gender Studies Program as well as the newly established minor in Sexuality & Gender Identity Studies.

A Review of the Literature on Same-Sex Parented Families

Rather than replicate already existing literature reviews and analyses, I wish to briefly summarize the current state of the research, drawing primarily upon my review and analysis of individual studies and critical reviews, including especially work of the American Psychological Association's (APA) Committee on Lesbian, Gay, and Bisexual Concerns (CLGBC); Committee on Children, Youth, and Families (CYF); and Committee on Women in Psychology (CWP) (2005); Cahill and Tobias (2007); Golombok and Tasker (Golombok, 2000; Tasker & Golombok, 1997; Tasker, 1999); Patterson (2000, 2000a; Wainright, Russell & Patterson, 2004); Pawelski et al. (2006); and Stacey and Biblarz (2001).

Five Common Concerns: I start by noting that five major areas of concern are typically identified by those who oppose extending marriage and other rights to lesbians, gay men, and bisexuals; these are:

1) *Sexual identity concerns* that children raised in same-sex parented families are more likely to grow up to be gay, lesbian or bisexual, than children raised in male-female parented families.
2) *Gender identity and gender role-related behavior concerns* that children raised in same-sex parented families are more likely to develop confusion regarding their gender identities and/or to express non-stereotypical gender role-related behaviors.
3) *Parental fitness of lesbians, gay men, and bisexual people concerns* regarding the general mental health of individuals with these sexual identities, as well as the abilities of lesbians, gay men, and bisexual people to attend to and care for children in a nurturing, developmentally appropriate manner.
4) *Sexual abuse concerns* that children raised in same-sex parented families are more likely to be abused than children raised in other-sex parented families.
5) *Psychological health and social relationship concerns* that children raised in same-sex parented families are more likely to experience psychological and relationship problems, in part due to the discrimination, teasing and bullying they are likely to experience because of their family form.

The State of the Scholarly Evidence: Before sharing with you the research evidence that challenges each of these concerns, let me state directly and emphatically that there is simply no empirical support for any of these five areas of concern.

1) *Sexual identity concerns*: The research evidence to date indicates that most children raised in same-sex parented families describe themselves as heterosexual, as do most children raised in other-sex parented families. Furthermore, among those studies that have included adolescent and adult children, there is no evidence of any pattern of romantic relationships or sexual behavior associated with one or the other family type.
2) *Gender identity and gender role-related behavior concerns*: The research evidence to date indicates that children raised in same-sex parented families are no more likely than children raised in other-sex parented families to experience gender identity concerns. Furthermore, the evidence indicates that gender role-related behaviors are no different among children raised by same-sex parents and those raised by other-sex parents.
3) *Parental fitness of lesbians, gay men, and bisexual people*: As noted above, the general concern here is with the mental health and stability of lesbians, gay men and lesbians. Specific concerns typically focus on gay men as too preoccupied with sex to be good parents, and lesbians as too masculine to be able to be nurturing as mothers. But the research evidence clearly indicates that lesbians, gay men and bisexual people are as mentally healthy as heterosexual people, and that those who are parents focus their attention as necessary on parenting. They are no more likely to be preoccupied with their partner relationships and sex within these relationships than are heterosexuals. Furthermore, child rearing approaches appear to be quite similar across sexual identities. Finally, there is simply no evidence that being in a same-sex partnership detracts from the ability to care for children

4) *Sexual abuse concerns*: There is simply no support for this concern; sexual abuse is a serious issue for all of us to be concerned about, but children raised by same-sex parents are at no greater risk of sexual abuse than children raised by other-sex parents.
5) *Psychological health and social relationship concerns*: There is simply no empirical support for this concern that children raised in same-sex parented families are more likely to experience problems in their social relationships or with their individual psychological health. Indeed, some of the research findings actually indicate that children raised by same-sex parents may demonstrate improved psychological health and relationships with others, as a result of developing better coping skills, ways of expressing emotions, and deeper understandings regarding the negative effects of bias, discrimination and oppression.

More to the point, when we step back from examining particular concerns and instead consider the underlying concern that (a non-heterosexual) sexual orientation of parents per se impacts parenting capabilities and child outcomes, the answer is clear: it does not. As Dr. Charlotte Patterson, an internationally respected researcher in the field, concluded after critically reviewing the available research to date for the 2005 report on "Lesbian and Gay Parenting" published by The American Psychological Association's Committees on Lesbian, Gay, and Bisexual Concerns; Children, Youth, and Families; and Women in Psychology (see http://www.apa.org/pi/parent.html),

> There is no evidence to suggest that lesbian women or gay men are unfit to be parents or that psychosocial development among children of lesbian women or gay men is compromised relative to that among offspring of heterosexual parents. *Not a single study*[1] *has found children of lesbian or gay parents to be disadvantaged in any significant respect relative to children of heterosexual parents*. Indeed, the evidence to date suggests that home environments provided by lesbian and gay parents are as likely as those provided by heterosexual parents to support and enable children's psychosocial growth. [Italics added.]

Similarly, Pawekski et al. (2006, p. 361) put it this way:

> More than 25 years of research have documented that there is no relationship between parents' sexual orientation and any measure of a child's emotional, psychosocial, and behavioral adjustment. These data have demonstrated no risk to children as a result of growing up in a family with 1 or more gay parents. Conscientious and nurturing adults, whether they are men or women, heterosexual or homosexual, can be excellent parents.

[1] To be clear, some studies do exist that have been used to demonstrate negative outcomes to children raised in same-sex parented families. But these studies have been strongly critiqued in terms of sampling and data analysis methods. See, e.g., American Psychological Association's Committees on Lesbian, Gay, and Bisexual Concerns; Children, Youth, and Families; and Women in Psychology (2005); Herek (1998).

Quality of Family Life Is More Important Than Family Structure

Thus far, I have focused only on summarizing the research evidence that challenges the typical concerns raised by those who oppose extending marriage rights to same-sex couples, and to the more general concern regarding the impact of sexual orientation on child outcomes. Now I would like to take a more critical look at the attention placed on family structure itself compared to focusing on the quality of family processes.

There is one particular study (included in the review by Patterson referred to above) that is particularly useful for Vermonters as we consider the question of extending marriage rights to same-sex couples. Wainright, Russell and Patterson (2004) compared 44 adolescents parented by same-sex couples and 44 adolescents parented by opposite-sex couples and found that the adolescents in the two groups did not differ significantly on almost any the many variables they measured related to psychosocial adjustment and school outcomes. Instead, the researchers found that regardless of family type, adolescents were more likely to show positive adjustment when their parents described close relationships with them, and when the adolescents themselves perceived more caring from adults.

I do not wish to ignore the limits to this and most other studies of same-sex parented families that have tended to be based upon relatively small sample sizes. Yet in this particular case, the study actually drew its sample from a national federally funded survey and most importantly, it used matched groups of adolescents—meaning that the adolescents' same-sex and opposite-sex parented families did not differ on various other demographic characteristics. This is one of the most common and serious flaws of studies that aim to compare two-parent families with other types of families. That is, they typically do not match the families on various other demographic characteristics such as economic resources, time resources, and number of parents versus the gender composition of parents. Thus, most of these studies are unable to help us truly understand the impact on children of being raised in a diversity of family forms.

But beyond these limitations, what I would like to ask you to consider is that comparing child outcomes across diverse family forms is not what we should be focusing on in this debate. If we as Vermonters are mainly concerned with the welfare of all children, we would take heed of the broadly accepted conclusion among social scientists based upon the available knowledge to date, that "family structure, in itself, makes little difference to children's psychological development. Instead, what really matters is the quality of family life" (Golombok, 2000, p. 99).

If we combine this conclusion with the prior one that sexual orientation per se is not related to parenting and child outcomes, we would recognize the importance of extending marriage to same-sex couples. This would allow such couples to receive the legal and social benefits of marriage, and thus to improve the quality of the family context within which to raise children.

Professional Organizations and Professionals Who Support Same-Sex Marriage

This is precisely the conclusion reached by a large number of major professional organizations, religious institutions, community leaders and others (for a listing of such endorsements, see, e.g., Marriage Equality U.S.A., 2008; and the Professional Association Policies section of "Lesbian and Gay Parenting," the 2005 APA document (http://www.apa.org/pi/lgbc/publications/lgpprofessional.html). Among these are the Academy of Child and Adolescent Psychiatry (1999), the American Academy of Family Physicians (2002), American Academy of Pediatrics (2002; see also Pawelski et al., 2006), American Anthropological Association (2004), American Medical Association (2004), American Psychological Association (2004, 2005), American Psychiatric Association (2005) and the National Association of Social Workers (2002).

Let me highlight here policy excerpts from just two of these organizations. My own professional organization, The American Psychological Association, put forth a simple resolution in 2004 that states that the "APA supports the provision to same-sex couples of the legal benefits that typically accrue as a result of marriage to same-sex couples who desire and seek the legal benefits."

Similarly the American Academy of Pediatrics' (2002) statement notes that:

> Children deserve to know that their relationships with both of their parents are stable and legally recognized. This applies to all children, whether their parents are of the same or opposite sex. The American Academy of Pediatrics recognizes that a considerable body of professional literature provides evidence that children with parents who are homosexual can have the same advantages and the same expectations for health, adjustment, and development as can children whose parents are heterosexual. When two adults participate in parenting a child, they and the child deserve the serenity that comes with legal recognition.

More recently, this organization has expanded its policy statement to the following:

> Civil marriage is a legal status that promotes healthy families by conferring a powerful set of rights, benefits, and protections that cannot be obtained by other means. Civil marriage can help foster financial and legal security, psychosocial stability, and an augmented sense of societal acceptance and support. Legal recognition of a spouse can increase the ability of adult couples to provide and care for one another and fosters a nurturing and secure environment for their children. Children who are raised by civilly married parents benefit from the legal status granted to their parents. Gay and lesbian people have been raising children for many years and will continue to do so in the future; the issue is whether these children will be raised by parents who have the rights, benefits, and protections of civil marriage…. There is ample evidence to show that children raised by same-gender parents fare as well as those raised by heterosexual parents…. The rights, benefits, and protections of civil marriage can further strengthen these families (Pawekski et al., 2006, p. 361).

This is the conclusion we the undersigned have also reached. Civil Unions do not offer same-sex parented families the full extent of the rights, benefits and protections of civil marriage. It is time, now, to extend marriage benefits to same-sex couples, for the welfare of Vermont's children. The scientific evidence is unequivocal and lends itself to no other conclusion.

Respectfully submitted,

Jacqueline S. Weinstock, Ph.D.
Associate Professor, Human Development & Family Studies, UVM

Additional Professional Signatories

On the following page I have listed the names of other UVM Faculty members who endorse the arguments and support the conclusion articulated here. Please note that this is not an exhaustive list of UVM faculty members in the social sciences and education who support the arguments articulated in this letter, but only those I was able to reach to review and endorse this letter in the past two days. Please also note that UVM affiliation and title/department information are provided for informational purposes only.

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November 2, 2007

Honorable Tom Little, Chair
c/o Rosalind Daniels
Vermont Commission on
Family Recognition and Protection
Vermont Statehouse
Montpelier, Vermont 05609

Dear Mr. Little:

Thank you for your efforts to consider whether Vermont should amend our laws to recognize marriage between same sex couples.

I am one of the officials responsible for providing information to individuals who have questions about civil unions in Vermont. From my experience over the past seven years, it is my belief that individuals who have obtained a civil union in Vermont do not experience the same benefits as those individuals who have a Vermont marriage. Specifically, a couple who leaves the state often end up in legal limbo.

When the legislature adopted the civil union law in 1999 it gave the Secretary of State's office a role in implementing the new rules. We provided information and training to Vermont's justices of the peace and town clerks, and we also provided town clerks with an informational pamphlet about civil unions to hand out to people who wished to enter into a civil union. The pamphlet explains the benefits, protections and responsibilities of a civil union and that Vermont residency may be required for dissolution of a civil union in Vermont. 18 V.S.A. § 5160(f). Because of this publication and our role in implementation of the civil union law, my office has become a place that people who have entered into civil unions come to when they have a problem or question about Vermont law.

Over the years we have had a growing number of calls and e-mails about the validity of civil unions in other states; and many question about whether individuals who were not resident of Vermont could dissolve their Vermont civil unions. I have attached some samples of e-mail correspondence I have received over the past year. For example, one individual writes "My Partner and I had our Civil Union in Vermont approximately 5 1/2 years ago. I understand in order to dissolve a civil union that one of the parties must reside in Vermont. My question is whether there is any way around this? I have court documentation regarding the custody of our children which makes is clear that we are

indeed separated. The documentation I have are permanent orders regarding custody, child support, visitations, health and medical insurance etc. Would this documentation prove enough to get our Union dissolved? I am not allowed to relocate to another state with my children in order to accomplish this. I also am engaged again and would like to make arrangements for a marriage in Massachusetts, where I reside." If this couple had married in Vermont the Massachusetts court could issue a divorce decree.

A Maryland resident wrote, "This has become a dangerous legal situation, as this piece of paper sits in your state without resolution. . . . Whatever the reason for this union not working, like any other union that does not work out, we have the right, as any decent human beings do, to resolve the situation. . . . Again, if out-of-state residents do not have the same right to termination that in-state residents have, then the out-of-state unions should be null and void." Another person wrote, "I hold great respect for the laws of this country and the institution of the civil union. My question is there any alternative way of dissolving the civil union with both us living in Indiana? My state does not recognize the civil union, so they will not dissolve it. I am eager to move on in my life, but will not commit until the union is dissolved."

As you can see, unlike a person who has been married in Vermont, a person who has obtained a civil union here leaves the state and enters into a legal limbo that has meaningful consequences for the individuals and their families..

Feel free to contact me if you would like additional information.

Sincerely,

Deb Markowitz
Secretary of State

MIDDLEBURY

Peter F. Langrock
Ellen Mercer Fallon
William B. Miller, Jr.
James W. Swift
Emily J. Joselson
Mitchell L. Pearl
Kevin E. Brown
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REPLY TO:
Middlebury Office

February 27, 2008

The Vermont Commission on Family
Recognition and Protection
c/o Legislative Council
115 State Street
Montpelier, VT 05633-5301

Dear Commissioners:

Thanks to all of you for your service. I realize that it's time-consuming and thankless work, but it's important, and is much appreciated.

I served as co-counsel to the plaintiffs in *Baker v. State*, was involved in the development and implementation of the civil union law, and frequently represent gay, lesbian, bisexual and transgender individuals as well as same-sex couples. (I also serve as Chair of Vermont Freedom to Marry.)

Many of you have asked: "What would civil marriage bring to same-sex couples in Vermont that we don't already have with our civil union law?" Below I take a crack at that question, with a heightened focus on tangible legal protections. I apologize for the detail and length, but I believe the testimony to date hasn't fully addressed the many tangible legal consequences of civil marriage that are denied same-sex couples, and that would become available, some *immediately,* upon amendment of Vermont's marriage laws. I also refer you to the recent report of the New Jersey Civil Union Review Commission which also addresses many of these issues. We're hopeful that information from this important resource is included in your report.

Civil marriage is regulated exclusively by the state. Nobody can obtain a civil marriage license and become legally married without a marriage license issued by the state. However, the status of civil marriage serves as a gateway to a broad range of social and legal protections—only some of which are provided by the state itself. In addition to various state law protections (e.g. automatic inheritance rules, protections in connection with joint property ownership, and family leave in the workplace), the benefits that flow from civil marriage include:

1) a host of privately-conferred financial benefits and protections awarded by third parties on the basis of marital status (including health insurance);

2) security in traveling from state to state (sometimes called "portability;"

3) critical federal protections (including social security survivor benefits, family-friendly immigration laws, and benefits for military spouses);

4) participation in an institution that carries considerable personal significance for many, and undeniable social significance;

5) a legal status that is widely understood throughout the country and the world, communicating familial commitment; and

6) inclusion and equality.

By design, the only thing the civil union law deals with squarely is specific state law protections. The civil union falls short with respect to each of the other categories listed above. I address each in turn—noting those areas in which a move to inclusive marriage would bring about immediate, short term, and/or long term change.

1. Privately-Conferred Benefits/Health Insurance:

The most significant privately-conferred benefit flowing from civil marriage is health insurance. Even now, over seven years after Vermont's civil union law took effect, I field phone calls from individuals whose employers decline to provide spousal health insurance coverage for their civil union partners even though those same employers provide spousal health insurance coverage for heterosexual employees' spouses. In some cases, reluctant employers have been persuaded to provide the coverage. However, due to the federal constraints on state regulatory power embodied in the law known generally as "ERISA," in cases involving self-insured employers (and arguably other employers) the legal power of the state to compel employers to provide the health insurance coverage on a non-discriminatory basis is in question.

The civil union law leaves same-sex couples far more vulnerable than our heterosexual counterparts. It *also* leaves same-sex couples in a worse position than if Vermont followed Massachusetts' lead and included same-sex couples in marriage. The reason is this: ERISA may *protect* certain employers' ability to discriminate; it does not, however, *require* those employers to discriminate. Because Vermont's law establishes a new and separate legal category for same-sex couples, those couples are not automatically covered under the terms of many self-insured policies that provide for coverage for married spouses. If a self-insured employer in Vermont (or based outside of Vermont but employing individuals in Vermont) wants to avoid discriminating, that employer must take the affirmative step of modifying its self-insurance plan to include civil union spouses. An employer who wants to continue discriminating simply does nothing. In other words, under Vermont's civil union law, inertia favors discrimination against same-sex couples.

By contrast, if Vermont law allowed same-sex couples to marry, then same-sex married spouses would be automatically covered under most self-insurance plans on the same terms as

heterosexual married spouses. A business seeking to take cover behind ERISA's federal pre-emption would have to affirmatively amend its plan to discriminate against employees in same-sex marriages. The burden of inertia would favor *equality* for same-sex couples. Given that many self-insured employers are based out of state, and have plans that are national in scope that they're not likely to tweak on a state-by-state basis, allocation of the burden of inertia is critical.

This concern is not simply hypothetical. I recently spoke to a Vermonter, Joe, who has just started a new job. He works in Vermont, but his employer is based out of state. His employer informed him that it cannot provide spousal health insurance benefits to his partner, notwithstanding Vermont's civil union law, but it *would* provide him health insurance benefits if he were legally married to his same-sex partner because its insurance plan covered marital spouses.

In addition to placing the burden of inertia on the side of discrimination, Vermont's civil union law unwittingly places our state's moral authority on the side of discrimination. Discriminating businesses can now take cover behind Vermont's civil union law; they're not, after all, discriminating against gay people; they simply don't provide coverage for *civil union* spouses. In a world in which same-sex couples were on equal footing through marriage, and the default presumption would therefore be coverage for same-sex partners on equal terms, a business would have to change its plan to say, "we provide health insurance benefits for spouses in *heterosexual* marriages, but not spouses in '*gay*' marriages." Some businesses may make the effort to do so, but few respected businesses would be willing to so blatantly embrace discrimination.

For this reason, although issues surrounding health insurance are not unheard-of in Massachusetts, they are less prevalent than in Vermont. This is an area in which passage of an inclusive marriage bill would bring about **immediate** and **tangible** change for **many** Vermonters in same-sex relationships, while simultaneously moving the conversation forward to bring about **long term tangible** change for **all** same-sex couples who choose to marry.

2. Security When Traveling Outside of Vermont ("Portability")

When a married, heterosexual couple cross a state border, they don't question whether, in the eyes of the law, they're still married. Of course they are. That's not true for couples joined in civil union, and the insecurity we experience affects our lives in real and significant ways.

a. Practical Considerations

Before New Hampshire had a civil union law of its own, my friend Laurie, who lives in the Upper Valley, went to a New Hampshire medical office for a routine mammogram. Without a second thought, she listed her civil union partner as "next-of-kin" on the registration paperwork. The medical assistant refused to accept the paperwork, and asked her to write the name of a legal family member; she indicated that Laurie's civil union partner would not qualify in New Hampshire. When pressed as to why the clinic needed Laurie to complete the "next-of-kin" form in the first place, the assistant explained that if, for example, Laurie were to die, they needed to know who could retrieve her remains. It wasn't a helpful answer, especially given the routine

nature of Laurie's visit that day, but it was telling; Laurie couldn't even trust that her life partner would be able to take charge of her bodily remains, notwithstanding the life they had shared together and the legal relationship they had formed in Vermont. Laurie indignantly told the assistant the clinic could keep her body, and she declined to change her next-of-kin designation.

My friends Lisa and Jenny shouldered a huge burden to avoid this kind of situation, when the stakes were truly high. Late in her pregnancy with their son, Simon, Jenny developed preeclampsia. It was a condition that potentially put Jenny at risk. The closest major medical center was Dartmouth-Hitchcock, and ordinarily that's where Jenny would have been hospitalized. But the risks of crossing the border were too high. If something were to happen to Jenny, Lisa's relationship with their soon-to-be born child might not be recognized; he could be born an orphan while Lisa stood by helplessly. Instead, Jenny traveled over two hours by ambulance to Fletcher Allen where she stayed for several days while Lisa slept in a hotel, hours from her own home and workplace.

b. Litigation Regarding Recognition of Civil Unions

Case law regarding respect for civil unions outside of Vermont is scant. For the most part, the cases that do exist validate the sense of insecurity couples joined in civil union feel when traveling outside of Vermont. The Georgia Court of Appeals refused to respect a civil union, affirming that a mother violated an order prohibiting her from exercising visitation while cohabiting with someone to whom she was not married when the mother exercised visitation while living with her civil union partner. Burns v. Burns, 560 S.E.2d 47 (Ga.App.,2002). Likewise, a New York appeals court held that John Langan could not pursue a wrongful death case after the death of his partner of 15 years, notwithstanding their civil union, because they were not married. Langan v. St. Vincent's Hosp. of New York, 802 N.Y.S.2d 476 (N.Y.A.D. 2 Dept.,2005). And in a heated custody and visitation case, a Virginia trial court attempted to completely erase a child's relationship with one of her parents because that relationship flowed from a civil union. Thankfully, the appellate court rightly concluded that the trial court had acted without jurisdiction in that matter, since a Vermont court had already properly assumed jurisdiction. Miller-Jenkins v. Miller-Jenkins, 49 637 S.E.2d 330 (Va.App.,2006).

Courts in some states—Massachusetts, West Virginia, and Iowa, for example, have dissolved civil unions, but in doing so they haven't necessarily recognized the civil unions for broader purposes. Courts in other states—Connecticut (before its law changed) and Texas, for example, have declined to dissolve civil unions, creating tremendous hardship for estranged partners.

Going to court to is costly and burdensome, so we can't know how many times, and under what varying circumstances, couples joined in civil union have found themselves vulnerable and unprotected by their status outside of Vermont. But the case law affirms the reasonableness of the fears and insecurity so many couples experience.

c. *"Portability" of Marriage for Same-Sex Couples*

To be sure, if same-sex couples in Vermont could marry tomorrow, all of the insecurity and hardship would not instantly dissolve. Some states will not immediately recognize same-sex marriages. But the change would make a significant difference. Inclusive marriage laws would provide same-sex couples in Vermont two immediate advantages over civil unions with respect to portability: First, although some states will not immediately recognize a same-sex marriage, some states *will*. In the case of Langan v. St. Vincent's Hosp. of New York, cited above, two men who had been partners for 15 years joined in a civil union in Vermont. They returned to New York and one was in an accident and ultimately died. His surviving partner brought a wrongful death claim against the allegedly negligent party, and the New York courts had to decide whether a partner in a civil union had standing to file a wrongful death claim for the loss of his spouse (a claim clearly available to a married spouse). The New York appeals court concluded that the surviving partner could *not* bring a wrongful death claim. One of the main reasons it cited in its analysis was that a civil union *is not a marriage*. Because a civil union is not a marriage, the New York courts could not treat it as such, and could not allow the case to go forward. The clear thrust of the court's opinion was that if the two men had been legally married in Vermont the surviving partner could have brought a wrongful death claim.

Second, in deciding how to treat a same-sex marriage that was validly celebrated in another jurisdiction, courts can turn to over two centuries of common law developed around this very question—a body of law which incorporates a strong presumption in favor of respecting valid marriages. In addition, in evaluating their own state statutes that purport to preclude recognition of valid marriages from other states, courts can consider over two centuries of constitutional law dealing with marriage recognition issues. Civil unions are simply a blank slate. A whole new layer of uncertainty accompanies the new legal status of civil union.

d. *Conclusion With Respect To Portability*

Although it won't solve all portability problems in one fell swoop, amending Vermont's marriage laws to include same-sex couples will **immediately** provide same-sex couples with greater legal security when they travel to **some** states who will recognize the marriages. In the **short term**, the status of marriage will also enable same-sex couples who run into problems when they leave the state to plug into the centuries of case law regarding recognition of marriages noted above. Finally, in the **longer term**, insofar as each step we take toward full equality in one state moves the broader movement forward, the change will also move us toward portability to **all** states.

If Vermont's goal is to place same-sex couples on as close to the same footing as possible relative to our heterosexual counterparts, in the short run Vermont could continue to offer *both* legal statuses—civil union and civil marriage—to same-sex couples. That way couples would

enjoy security in traveling to states that may recognize their marriage but not their civil union, as well as in traveling to states that may recognize their civil union but not their marriage.[1]

3. Critical Federal Protections

In their testimony, law professors have pointed to the federal "DOMA" law as an obstacle to federal protections for same-sex couples. What they failed to emphasize is that **wholly independent of the federal DOMA law, Vermont has created a second obstacle between same-sex couples and federal protections**. This is important. By design, Vermont's civil union law does *not* open the door to critical federal protections for same-sex couples—not even a crack. Because our legislature created a new legal status out of whole cloth, rather than plugging into the legal status of marriage that is already embodied in federal law, our legislature ensured that same-sex couples would not be able to access critical federal protections without some additional act of law. Vermont's failure to allow same-sex couples to marry in the first place constitutes an independent obstacle standing between same-sex couples in Vermont and federal protections. **If DOMA were repealed tomorrow, our civil union law still would *not* open the door to federal benefits.**

The impact of these obstacles can be tragic. I represented one woman, Christina, who was raising an infant child with her civil union partner, Judith. Judith was the sole breadwinner for the family; Christina stayed home and raised their son. Judith was driving her truck to the dump one day, and apparently an eagle or other large bird swooped down in front of her windshield, causing her to drive off the road and roll down the embankment of the highway. She died, leaving Christina and their infant son with unimaginable grief and loss—and financially destitute. I got involved because the Social Security Administration initially denied the social security survivor's claim filed on behalf of the minor child on the ground that his relationship to Judith flowed from a civil union, which the federal government did not recognize. After several appeals, we prevailed on that issue. What's striking about this case is that Christina did not even bother to file a social security survivor's claim on her own behalf—even though a heterosexual, married spouse in the same situation would clearly be entitled to such benefits. Unable to support herself and her son, Christina had to give up the home she and Judith had made together, and she moved out of state to live with her family.

Because Christina and Judith were joined in civil union—a legal status with no grounding in federal law—she wasn't in a position to even file a claim for social security survivor benefits.

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[1] I don't believe couples would be precluded from entering into both. In my own practice I advise couples that laws saying that a person who is married cannot join in civil union do not preclude a person who is married from joining in a civil union *with the person to whom he or she is married.* I believe a contrary interpretation flies in the face of the purposes of the statute. I do have clients who have been legally married in other states and have joined in civil union in Vermont as well. I advise them that if they ever part ways, they will need to legally terminate both statuses.

Though a civil marriage would not have guaranteed those benefits—she may have run squarely into the federal "DOMA"-- it would have at least served as a vehicle for seeking the federal protections that were so critical to her family. If Christina and Judith had surmounted the first obstacle—the inability to marry—Christina could have directly confronted the second obstacle by challenging the federal DOMA law. Again, if Congress repealed DOMA tomorrow, the next Christina and Judith in Vermont wouldn't be any closer to the security provided by our social security laws because they would still be joined in a legal status that doesn't trigger federal protections. In short, passage of an inclusive marriage bill would **immediately** eliminate one of the two impediments standing between same-sex couples in Vermont and federal legal protections, enabling us to confront the second impediment head-on.

Moreover, preventing a recurrence of the travesty Christina experienced will likely require a series of steps—each of which is essential. Vermont may not be able to single-handedly eradicate federal discrimination tomorrow, but it can certainly do everything in its own power to ensure that we are not complicit in that discrimination, and we can and should add the weight of our own moral suasion to that of the State of Massachusetts to help build a national consensus in favor of genuine equality for gay, lesbian, bisexual and transgender citizens. Passage of an inclusive marriage bill would help ensure that families like Christina's don't face such injustices **in the long run**.

4. Significance of Civil Marriage

The premise underlying Vermont's civil union law was that it would provide same-sex couples all of the legal protections, supports, and obligations of civil marriage; however, this formulation ignores the reality that the legal status of *being married* is one of the critical protections, supports, and obligations of civil marriage. When asked why they chose to marry, most heterosexual couples do not first discuss their need for health insurance, or their concern for social security survivor benefits. They talk about their love for one another; they see marriage as a meaningful and public commitment, and a way of clearly defining their relationship and conveying the depth of their commitment to the broader world. Many same-sex couples value civil marriage for the same reasons. Many witnesses have conveyed this point in far more compelling terms than I can.

I should note that civil marriage is not the only legal status with significant personal and social significance. In addition to conferring a host of legal protections, the status of "citizen" has profound personal significance for many immigrants as well as natives. Likewise, the legal relationship status of "parent and child" created by a legal adoption has profound personal significance for the parties involved, in addition to the tangible legal benefits associated therewith.

5. Meaning and Understanding of Civil Marriage

Many witnesses have eloquently addressed their frustration that outside of Vermont, and even within this state, civil union is poorly understood, if it is understood at all. One Vermonter who attended the hearing in Lyndon last fall was there because she was considering entering into a

civil union with her male partner and she thought the hearing would provide information for her about civil unions. She had been through a difficult divorce, and wasn't sure that she was ready to marry again, so she thought a civil union might make more sense. She didn't realize that civil unions are limited to same-sex couples, nor did she know that they involved a similar level of legal entanglement. She perceived civil unions as a form of "marriage lite--" a way to get some basic benefits without the same commitment. The problem is compounded outside of Vermont. A friend of mine who hales from Wisconsin overheard his father describing a civil union to a peer as "like signing a power of attorney."

6. Inclusion and Equality

The professors at Vermont Law School thoroughly covered this aspect of the conversation, citing the Massachusetts Supreme Court's opinion that the exclusion and separation built into civil union laws renders such laws unconstitutional. Wholly apart from the constitutional arguments, it's simply wrong. And the impact of this kind of separation extends far beyond committed same-sex couples who want to marry. It affects every person in the community, as the law both reflects our community values and, in turn, shapes them. Again, the people you've heard testify have conveyed this point far more eloquently than I can.

One final note: Several speakers talked about the personal discomfort they've experienced because Vermont's creation of a separate legal status regularly forces gay people in same-sex relationships to "out" ourselves, even in contexts in which we might not choose to do so. Businesses, government bodies, employers and others frequently ask people to identify their marital status. (They rarely follow up by asking the gender of someone's spouse.) Because individuals joined in civil union cannot simply identify themselves as married, but instead have to answer these queries in a way that identifies them as gay, they are forced to draw attention to their sexual orientation in settings in which it is completely irrelevant. This can cause discomfort and embarrassment, and in the case of military members it significantly increases their exposure to expulsion pursuant to military regulations.

I would welcome the opportunity to address you directly about these matters.

I appreciate your consideration.

Thanks much,

Beth Robinson
brobinson@langrock.com
BR
c: Commission Members
443909.1

Vermont Legislative Council

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MEMORANDUM

To: Vermont Commission on Family Recognition and Protection

From: Michele R. Childs

Date: December 10, 2007

Subject: Recognition of Out-of-state Same-Sex Marriages in Vermont

Below is an analysis provided by chief counsel Bill Russell and myself to legislators in 2004 regarding recognition of same-sex marriages performed in other jurisdictions. We have not taken up the issue since that time and have reserved making any changes to our position until after the commission completes its hearings. However, as of now, we do not believe our analysis has changed.

You asked how a same-sex marriage established in Massachusetts or Canada might be treated in Vermont. We believe that it is most likely that Vermont's courts would grant parties to a same-sex marriage from another jurisdiction all of the same legal rights as parties to a civil union in this state - without recognizing them as "married." This is because to do so would be in accord with the state's policy for equal treatment of same-sex couples as expressed in the Supreme Court's *Baker* decision[1] and the Legislature's enactment of the civil union statute.[2]

However, we find nothing in those authorities or other law that clearly, and with certainty, requires this result. Neither expressly prevents the courts of this state from giving "full faith and credit" to a same-sex marriage from another jurisdiction nor from refusing to grant any recognition at all to a same-sex marriage from another jurisdiction.

Recognizing the legal rights of a same-sex married couple from another state

In the *Baker* decision, the Supreme Court held that same-sex couples are entitled under the Vermont Constitution "to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples." The Court stated that the granting of these benefits and protections did not have to take the form of inclusion within the marriage laws, but could be done through "a parallel 'domestic partnership' system or

[1] *Baker v. State*, 170 Vt. 194 (1999).
[2] No. 91 of the Acts of the 1999 Adjourned Session (2000).

some equivalent statutory alternative" that conforms with "the constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law." Thus, under *Bake*r, Vermont courts likely would be required to recognize the legal benefits and responsibilities of marriage of a same-sex couple who married in another state, but not constitutionally required to recognize a same-sex marriage as such. Denying any legal benefits and protections of marriage to a same-sex married couple who moved to Vermont likely would run afoul of the Vermont Constitution as interpreted in *Baker*.

In 2000, the Vermont legislature complied with the *Baker* ruling by enacting the civil unions law, recognizing the validity of same-sex unions by granting same-sex couples the legal benefits of marriage. The legislative findings from the civil union statute state the policy reasons that form the basis of the act and affirm that "[t]he state has a strong interest in promoting stable and lasting families, including families based upon a same-sex couple. Without the legal protections, benefits and responsibilities associated with civil marriage, same-sex couples suffer numerous obstacles and hardships." [3] Thus, failure to recognize an out-of-state same-sex marriage at all for the purpose of legal rights and responsibilities would go against state policy as expressed in statute as well.

Recognizing "marriage" of a same-sex couple from another state

Still at issue is whether state or federal law allows or requires Vermont to recognize same-sex marriages performed in another state as a "marriage" in Vermont. Under the federal constitution's "Full Faith and Credit Clause," [4] the laws of one state generally must be recognized and honored in another. While states generally recognize marriages performed in other states, there is an exception to this "place of celebration" rule if the marriage is contrary to the forum state's public policy.[5] If a state has a clear public policy on an issue that strongly conflicts with the policy of another state, it can choose to apply its own law.[6]

Thus, the question is whether a court in this state would find that Vermont has such a strong public policy against permitting same-sex unions to be designated as "marriage" sufficient to offset any constitutional obligation to give full faith and credit to the marriage laws of another jurisdiction.

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[3] §1, Legislative Findings, No.91 of the Acts of the 1999 Adjourned Session (2000).

[4] Article IV, § 1 of the U.S. Constitution.

[5] Vermont courts have held that a marriage contract will be interpreted in this state according to the laws of the state in which it was entered into, so long as to do so does not violate Vermont public policy. See *Poulos v. Poulos*, 169 Vt. 607, 737 A.2nd 885, 886 (1999).

[6] *See* Restatement (Second) of Conflict of Laws § 283 (1971). Also, the federal defense of marriage act (DOMA) specifically exempts states from having to recognize a same-sex marriage or similar union performed in another state. 28 U.S.C. §1738C and 1 U.S.C.§ 7. However, DOMA's constitutionality is questionable in that it appears to violate a state's obligations under the full faith and credit clause. Even if DOMA were found unconstitutional, however, the full faith and credit clause still permits states to refuse to recognize another state's laws or judgments if they violate the public policy of the state in which recognition is sought. Therefore, notwithstanding DOMA, the issue remains whether a strong public policy against recognition of same sex marriages exists in Vermont.

Vermont law contains more than one provision expressing a policy against permitting same-sex couples to "marry." Act 91clearly stated that marriage in Vermont is the "legally recognized union of one man and one woman." [7] Although Act 91 conveyed the legal benefits, protections and responsibilities of civil marriage to same-sex couples, it did not bestow the status of civil marriage to same-sex couples.[8] These provisions appear to suggest a policy against same sex-marriage that would permit Vermont to decline to recognize such marriages entered into in another state without violating the full faith and credit clause.

On the other hand, the legislative history of Act 91 reveals that in enacting the civil union statute, the Vermont House considered but then declined to directly address the status of an out-of- state same-sex marriage under Vermont law. On March 16, 2000, the Vermont House approved an amendment to H.847 (which became Act 91) defining marriage as the union between a man and a woman, but defeated an amendment that declared that the state "shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction regarding legal marriage that does not also meet the requirements of [Vermont's marriage law]." [9]

The House's intention in defeating this amendment could be interpreted two ways. It can plausibly be argued that in doing so, the House chose not to ban recognition of out-of-state same-sex marriages, and therefore, implied that such marriages may be recognized as such in Vermont. However, it is often misleading to base statutory interpretations on negative implications. The amendment's failure could as well be interpreted to mean that while the legislature did not intend to recognize a same-sex marriage as a marriage, it did not want to prohibit the recognition in this state of the legal rights that flow from the marriage. Acceptance of the amendment would have required the state to treat the marriage as if it had never existed, thereby denying the parties to an out-of-state same-sex marriage *any* of the legal rights afforded to married couples and couples in a civil union in Vermont, contrary to the accepted policy of providing families based upon a same-sex couple with benefits and protections under the law.

Conclusion

Recognition of either a marriage or a civil union usually occurs only when a couple asserts its legal rights as such, most often before a court. In this context, we believe that Vermont courts would most likely recognize the legal rights, but not the status, of a married same-sex couple, in keeping with the policy stated by the legislature in Act 91.

While we believe a same-sex marriage most likely will be recognized for the purpose of legal benefits and protections, some have expressed a concern as to whether the relationship will be recognized as a marriage or a civil union. From a legal perspective only, it makes little difference at the state level. The legal rights are

[7] *See* 15 V.S.A. § 8, 15 V.S.A. § 1201(4) and 1999, No.91 (Adj. Sess.), § 1, Legislative Findings.
[8] *See* 15 V.S.A. § 1204 and 1999, No. 91 (Adj. Sess.), §1, Legislative Findings.
[9] *See* Journal of the House, Thursday, March 16, 2000.

essentially the same. However, we recognize that to many people it is very important whether the relationship would be considered a marriage or a civil union. Unfortunately, the status of an out-of-state same-sex marriage in Vermont has not been made explicitly clear in the law. We believe it is likely that Vermont courts would either recognize the rights without addressing the issue of whether the union is a marriage or a civil union, or they would recognize the union as a civil union. We believe it is unlikely a Vermont court would recognize it as a valid marriage in this state, though it is of course impossible to predict with certainty how a court would rule.